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No. 83-2161-CFX
Status: GRANTED

Title: Montana, et al., Petitioners
v.
Blackfeet Tribe of Indians

Docketed:
June 29, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Boggs, Deirdre

Counsel for respondent: Whiteing, Jeanne S.

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1984	G	Petition for writ of certiorari filed.
2	Jun 29 1984		Appendix of petitioner Montana, et al. filed.
3	Jul 28 1984		Brief amicus curiae of States of AZ, ID, NV, and ND filed.
4	Aug 1 1984		DISTRIBUTED. September 24, 1984
5	Aug 4 1984	X	Brief of respondent Blackfeet Tribe of Indians in oppositi filed.
6	Aug 29 1984	X	Reply brief of petitioners Montana, et al. filed.
7	Oct 1 1984		Petition GRANTED. ***
8	Nov 15 1984		Brief amicus curiae of New Mexico, et al. filed.
9	Nov 15 1984		Brief amicus curiae of California filed.
10	Nov 15 1984		Joint appendix filed.
11	Nov 15 1984		Brief of petitioners Montana, et al. filed.
12	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 15, 1985. (3rd case
13	Nov 30 1984	G	Motion of the Solicitor General for leave to participa in oral argument as amicus curiae and for divided argument filed.
14	Dec 10 1984		Motion of the Solicitor General for leave to participa in oral GRANTED.
15	Dec 10 1984		CIRCULATED.
16	Dec 19 1984		Lodging received.
17	Dec 19 1984	X	Brief amicus curiae of Assiniboine and Sioux Tribes, et al filed.
18	Dec 20 1984	X	Brief amicus curiae of United States filed.
19	Dec 22 1984	X	Brief of respondent Blackfeet Tribe of Indians filed.
20	Dec 22 1984	X	Brief amicus curiae of Crow Tribe of Indians filed.
21	Dec 22 1984	X	Brief amicus curiae of Cotton Petroleum Corp., et al. file
23	Jan 8 1985	X	Reply brief of petitioners Montana, et al. filed.
24	Jan 15 1985		ARGUED.

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No. 83-_______

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is the provision of the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398 (1976), authorizing state taxation of oil and gas production on tribal lands applicable to leases made after the enactment of the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (1976)?

PARTIES TO THE PROCEEDING

The petitioners, all parties to the proceeding in the Ninth Circuit Court of Appeals, are: the State of Montana, the Director of the Montana Department of Revenue, Glacier County and Pondera County, Montana. The respondent is the Blackfeet Tribe of Indians.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioners,[1] the State of Montana, the Director of the Montana Department of Revenue, and Glacier and Pondera Counties, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States

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1 The petitioners are collectively called "the State." Statements pertaining only to the petitioner counties are noted.

Court of Appeals for the Ninth Circuit entered in this proceeding on April 3, 1984.

OPINIONS BELOW

A three-judge panel of the Ninth Circuit Court of Appeals issued its original opinion on December 14, 1982. That unreported opinion is reproduced in the Appendix to this petition (App. 70). On June 22, 1983, the Ninth Circuit ordered that the case be reheard *en banc*. 709 F.2d 521. The *en banc* panel issued its opinion on April 3, 1984. That opinion is reported at 729 F.2d 1192 (9th Cir. 1984), and appears at App. 1. In this petition, all references to the opinion of the Ninth Circuit Court of Appeals are to this April 3, 1984, opinion. The opinion of the United States District Court for the District of

Montana, issued by Judge Hatfield, 507 F. Supp. 446 (D. Mont. 1981), appears at App. 103.

JURISDICTION

The opinion of the *en banc* panel of the Court of Appeals for the Ninth Circuit was entered on April 3, 1984, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

1. *Federal Statutes*.

The Act of February 28, 1891, 26 Stat. 795, codified at 25 U.S.C. § 397 (App. 150).

The Act of June 30, 1919, 41 Stat. 3, 16, & 17, which provides in pertinent part as follows:

> ....the Secretary of the Interior is authorized to make allotments under existing laws within the said [Blackfeet] Reservation to any Indians of said Blackfeet Tribe not heretofore allotted....
>
> Provided further, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly: Provided, That the lands containing said minerals may be leased under such terms and conditions as the Secretary of the Interior may prescribe.

The Act of May 29, 1924, 43 Stat. 244, codified at 25 U.S.C. § 398 (App. 152), which provides in pertinent part:

> Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands:

> Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The Indian Reorganization Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461-479 (App. 154).

The Act of May 11, 1938, 52 Stat. 347, codified as amended at 25 U.S.C. §§ 396a-396g (App. 175). Section 7 of that Act provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."

2. State Statutes.

MONTANA CODE ANNOTATED [hereinafter MCA]:

Oil and Gas Net Proceeds Tax, § 15-23-601, -603, -605, -607, -608, MCA (App. 181).

Oil and Gas Severance Tax, §§ 15-36-101, -103, -105, MCA (App. 195).

Resource Indemnity Trust Tax §§ 15-38-103, -106, -108, MCA (App. 206).

Oil and Gas Conservation Tax, §§ 82-11-101 (in pertinent part), -131, -132, MCA (App. 215).

REVISED CODES OF MONTANA, 1947 [hereinafter R.C.M. 1947]:

Oil or Gas Producers' Severance Tax §§ 84-2202, -2204, -2205 and -2209.1, R.C.M. 1947 (the predecessors to §§ 15-36-101, -103 and -105, MCA) (App. 222).

STATEMENT OF THE CASE

The Blackfeet Tribe of Indians filed the complaint in this case in 1978. The complaint challenged taxation of the Tribe's royalty interests in oil and gas

produced on the Blackfeet Indian Reservation, Montana.[2] The Blackfeet Tribe is the lessor of 125 parcels of tribal land for oil and gas mining purposes. All of the challenged taxes are paid by non-Indian lessees.[3] The

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2 Four taxes are at issue: (1) the Oil and Gas Conservation Tax, § 82-11-131, MCA (formerly § 60-145, R.C.M. 1947) (App. 215); (2) the Resource Indemnity Trust Tax, § 15-38-104, MCA (formerly § 84-7006, R.C.M. 1947) (App. 206); (3) the Oil and Gas Severance Tax, § 15-36-101, MCA (App. 195); (4) the Oil and Gas Net Proceeds Tax, § 15-23-601, et seq. MCA (formerly §§ 84-7201, et seq., R.C.M. 1947) (App. 181). The State of Montana through the Montana Department of Revenue collects all taxes except the Oil and Gas Net Proceeds Tax. Although reported to the Department of Revenue, it is collected by the respective county treasurers for the use of the counties. Petitioners Glacier and Pondera Counties have portions of the Blackfeet Reservation within their boundaries.

3 The lessee-producers' portion of the taxes is not challenged in this case. See n.14, infra.

Tribe admits that it has not directly paid any of the taxes, but asserts that the producers have deducted the Tribe's share of taxes from the royalty payments. No producer is a party to this action.

Leasing of the Blackfeet Tribe's oil and gas began in 1932. Between 1935 and 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases. The taxes were collected pursuant to the specific taxation authority granted to states by the Indian Mineral Leasing Act of 1924, Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 (App. 154), [hereinafter the "1924 Act"] on oil and gas production on

"unallotted land"[4] within the Blackfeet Indian Reservation. The question in this case is whether the 1924 Act's taxation authority survived the passage of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (App. 175) [hereinafter the "1938 Act"].

The validity of Montana taxes on oil and gas production of the Blackfeet tribal minerals leased prior to the 1938 Act was upheld by the Montana Supreme Court and this Court in 1936, in

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4 Although some or all of the Blackfeet leases are for minerals underlying lands that were allotted within the Blackfeet Reservation, all minerals were specifically reserved by Congress to the United States for the benefit of the Tribe, by the terms of the Act of June 30, 1919, 41 Stat. 3, 16, 17, and are therefore "unallotted lands." British-American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S. 159, 163 (1936).

British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), aff'g 101 Mont. 293, 54 P.2d 129 (1936). The complaint in British-American was filed by a producer-lessee, and the Blackfeet Tribe filed a complaint in intervention in the state court proceedings. Montana's gross production and net proceeds taxes at issue in that case were predecessors to the present taxes, and were all assessed against and collected from the producer-lessees, who then could deduct the taxes paid on royalty interests from the royalty payments that were paid to the United States. See British-American Oil Co., supra, 54 P.2d at 131-32.

Since their unsuccessful complaint in intervention in British-American, the Blackfeet Tribe made no other challenge to these taxes until 1976 when the Tribe

filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as the involvement of the Bureau of Indian Affairs.[5] Similarly, no oil and gas producers challenged the taxes. The United States Department of Interior has never challenged the taxes but has consistently recognized the taxes as legitimate. The Department of Interior and the United States Geological Survey, charged with administration of the Tribe's leases and collection of royalty payments, permitted payment of the challenged taxes from the inception of

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5 Blackfeet Tribe of the Blackfeet Indian Reservation and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. The Department of Revenue of the State of Montana, et al., No. CV-76-6-GF, U.S. District Court for the District of Montana, Great Falls Division.

oil production until 1977.[6]

In 1938, Congress passed the Indian Mineral Leasing Act of 1938, supra. The 1938 Act changed or did away with various specific provisions of prior Indian mineral leasing acts, and in its last section stated that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Neither the 1938 Act nor any contemporary commentary made any mention of changes or repeals of the tax authorization of the 1924 Act.

In 1977, Leo Krulitz, then Solicitor of the Department of Interior, issued an

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6 This administrative history is documented in a series of memoranda and opinions from the office of the Solicitor of the Department of Interior: 58 Interior Dec. 535 (1943) (App. 232); Memorandum M-36246 (October 29, 1954) (App. 248); Memorandum M-36310 (October 13, 1955) (App. 258); Memorandum M-36345 (May 4, 1956) (App. 262). See part 5, infra.

opinion holding that the 1938 Act "replaced" the 1924 Act, and that the State could not levy its taxes on oil and gas production from leases made under the 1938 Act. 84 Interior Dec. 905 (1977) (App. 267). Shortly thereafter, the Blackfeet Tribe filed the instant action. First Amended Complaint of the Blackfeet Tribe (App. 131).

In the District Court, the Tribe, the State of Montana and the Director of the Montana Department of Revenue, and Pondera County filed motions for summary judgment. United States District Judge Hatfield granted the State's motion for summary judgment, holding that the 1924 Act expressly authorized state taxation of all oil and gas production on unallotted Indian land, and that this express provision authorizing state taxation was not implicitly repealed by

the provisions of the 1938 Act. (App. 103). Judge Hatfield did not rule on the State's alternate ground for summary judgment, that the incidence of all taxes except the Net Proceeds of Royalty Tax was upon the non-Indian oil producers, who were required by Montana's statutes to report and pay all taxes.[7]

The Blackfeet Tribe appealed Judge Hatfield's decision to the Ninth Circuit

7 The State has never conceded that the tribal royalty was in fact taxed. The Net Proceeds Tax is the only challenged tax in which the producer's interest is mathematically segregated from the royalty owner's interest. The remaining taxes are reported and paid by the producers, and it is not possible for the Montana Department of Revenue to tell from its records what is the arrangement between the producers and the Tribe with respect to proration of the taxes. Montana law permits the producer to pass on a pro rata share of the taxes unless the lease provides otherwise. See, e.g., §§ 15-36-101(3) and 15-38-104, MCA.

Court of Appeals, and on December 14, 1982, a three-judge panel affirmed the District Court's ruling. (App. 70.) The Tribe petitioned for rehearing en banc, which was granted on June 22, 1983, 709 F.2d 521. On rehearing en banc, the Ninth Circuit Court of Appeals held that there had been no repeal of the tax authority in the 1924 Act and that the State continued to have authority to tax

(Footnote 7 continued)

The collection mechanism between the producers and the Tribe has been varied. See, e.g., 58 Interior Dec. 535 (1943) (App. 232); Memorandum M-36246, October 29, 1954 (App. 248, 251, 257). It is assumed for purposes of this petition that the producer pays the taxes, and either deducts them from the royalty payments or receives a refund from the Department of Interior for the pro rata portion of the tax attributed to the Tribe's royalty. If the State prevails in its argument that the 1924 Act's tax authorization applies to leases made after 1938, all taxes on production will be permissible, including taxes on the Tribe's royalty.

oil and gas production for 1924 Act leases.[8] The en banc panel, however, held that the 1938 Act completely replaced all prior leasing acts, including the 1924 Act, so that royalties from production under all leases made after May 11, 1938 are not subject to Montana's taxes. The court held that the 1938 Act had to be read together with the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79, (App. 154) [hereinafter "I.R.A."], and that the Act's policy and purposes would not permit state taxation of oil and gas

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8 The 1924 Act amended the Act of Feb. 28, 1891, 26 Stat. 795, codified at 25 U.S.C. § 397 (App. 150), by extending the term of the leases from ten years to as long as there was production of oil and gas. British-American, supra, held that these Acts should be read together as a whole and that, therefore, the 1924 Act's tax authorization applied to 1891 Act leases. The Ninth Circuit found this "problematic." (App. 13, n.9.)

produced on unallotted Indian lands.

After holding that the state taxes at issue here were not authorized by the 1938 Act for leases entered into pursuant to that Act, the court nonetheless remanded the case to the District Court for a determination of the legal incidence of the State's taxes, and a determination of whether the taxes were preempted, using the analysis required in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) (App. 51). Three judges dissented from the holding that the 1938 Act "replaced" the 1924 Act.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion demonstrates a masterful, but

erroneous, effort to accomplish judicially what Congress did not do--repeal or replace the 1924 Act's express authorization of the State's taxes on production of oil, gas, and other minerals. The 1938 Act was silent on the issue of taxation and contained a general repealer, repealing only "all Act or parts of Acts inconsistent" with the 1938 Act. The legislative history of the 1938 Act made no mention of changing the provision allowing state taxation of production of oil and gas. The Department of Interior, which had supported adoption of both the 1924 and the 1938 Acts, assisted the State in collecting its taxes on all leases for a period of more than 40 years. The court ignored the plain language of the 1924 Act and discredited the administrative history which is compelling evidence of

the continued vitality of the 1924 Act's tax authorization, including leases made pursuant to the 1938 Act.

In holding that the 1938 Act "replaced" but did not repeal the 1924 Act, the court found that the 1924 tax authorization is in force for leases made between 1891 and 1938, but by judicial fiat determined that the otherwise operative tax authority did not affect leases made after May 11, 1938.

The court repudiated applicable canons of construction which, if applied, compel the conclusion that the 1924 Act's tax authorization was not repealed or replaced by the later act which was silent on the issue. The cornerstone of the court's opinion was its conclusion that the 1938 Act must be viewed in light of policies of the 1934 I.R.A. That act, too, was silent on the topic of state

taxation of production of oil and gas owned by Indians. Despite what appears to have been a scholarly examination of the legislative history of the I.R.A., the court was not able to find any evidence in the legislative history directly on the topic of state taxation of production of oil and gas owned by Indians. Nonetheless, the court held that one of the policies of the I.R.A. was that Indians' oil and gas production shall be exempt from state taxation, and that therefore the later 1938 Act "replaced" the 1924 Act's taxation authority. The court thus embarked on the erroneous course of using general policies pertaining to different acts of Congress to rewrite the plain language of statutes and contemporaneous legislative history of the act in question.

The Ninth Circuit's opinion is in conflict with opinions from the Eighth and Tenth Circuits and this Court which have refused to use I.R.A. policies to interpret and repeal the plain language of statutes. The question of the applicability of the 1924 Act's tax authorization to leases made after the 1938 Act is an important one which merits decision by this Court.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. <u>The Issue of the State's Authority to Tax Under the Terms of the 1938 Act Is One of First Impression</u>.

Despite the long-time administrative practice and common understanding allowing Montana to collect its taxes on oil and gas production, the question of

the authority of states to tax mineral production on unallotted lands on Indian reservations under 1938 Act leases is an important one of first impression for this Court. It has never been put before and answered by any courts, to petitioner's knowledge, except for the lower courts in this case, the District Court in *Merrion v. Jicarilla Apache Tribe*, No. 77-292 (D.N.M. Dec. 29, 1977), *rev'd*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982), and the Arizona Supreme Court in *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130, 389 P.2d 1013 (1963).[9] The same question was later presented to the Tenth Circuit Court of Appeals by the

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9 Since the inception of this case, however, numerous other cases have proliferated in Montana and elsewhere. *See* part 2, *infra*.

plaintiffs and amicus in *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). In that case, the producer-lessees challenged the validity of Utah's oil severance tax on oil produced on unallotted Navajo lands. The Tenth Circuit declined to answer this question because it lacked jurisdiction under the provisions of the federal tax anti-injunction act, 28 U.S.C. § 1341.

Since *British-American*, *supra*, in 1936, there have been two occasions to petitioners' knowledge when this Court has commented on but did not decide the question of tax authority of states with respect to mineral production on unallotted lands on Indian reservations. The Court mentioned the existence of the state tax authority under the 1924 Indian Mineral Leasing Act in a footnote to *McClanahan v. Arizona Tax Commission*, 411

U.S. 164, 177 n.16 (1973). While McClanahan did not concern the issue of the power of states to tax production of Indian minerals, and this Court therefore made no decision on that issue, the Court did cite that act in footnote 16 as an example of express congressional authority for state taxation, thus suggesting that states' authorization to tax under the 1924 Act was still valid.[10]

More recently, this Court commented on states' power to tax production of Indian oil and gas in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). That case involved a New Mexico

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10 Footnote 16 in McClanahan also refers to 18 U.S.C. § 1161 as evidence that "state liquor laws may be applicable within reservations." 411 U.S. at 177 n.16. Last year in Rice v. Rehner, 103 S. Ct. 3291, 3302 (July 1, 1983), this Court found that that reference did in fact indicate the existence of a statute expressly providing for application of state law.

Indian Tribe whose reservation was created by executive order rather than by treaty. The leasing authority for that reservation was set forth in the 1927 Indian Mineral Leasing Act, Act of March 3, 1927, 25 U.S.C. § 398c, which authorized mineral leasing and state taxation of mineral production on executive order reservations. In Merrion, the leases in question were post-1938 Act leases and the non-Indian lessees were being taxed by the State of New Mexico. The Jicarilla Apache Tribe argued to the Tenth Circuit and to this Court that the 1927 Act's taxing authority was inapplicable to leases made pursuant to the 1938 Act. This Court and the Tenth Circuit declined to decide whether New Mexico had taxation authority because the State of New Mexico was not a party in that case. Merrion, 617 F.2d at

547 n.5, 455 U.S. at 151 n.17.[11] Nonetheless this Court's opinion suggested that the state authority to tax may be in effect. For instance, this Court stated that "the mere existence of state authority to tax does not deprive the Indian Tribe of its authority to tax." 455 U.S. at 151. Also, the three dissenting justices in Merrion appeared to think that the purposes of the 1927 Act and the 1938 Act are the same with regard to the authority of the state to tax mineral production. 455 U.S. at 186 n.46. In any event, this Court's attention to this unanswered question certainly highlights the importance of

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11 The district court opinion in Merrion held that the 1938 Act did give states authority to tax oil and gas produced on tribal lands, rejecting the Jicarilla Apache Tribe's contention that the 1938 Act repealed by implication the express taxation authority of the 1927 Act.

the question and the need for it to be settled now.

2. The Ninth Circuit Opinion Raises Serious and Recurring Problems for Montana and Other States.

In the State of Montana, four producers[12] with leases on the Blackfeet Indian Reservation are now paying their oil and gas production taxes under protest and suing for refunds. Prior to the instant case, the producers paid all of these taxes without challenge, and, at the direction of the Department of Interior, deducted the taxes paid on the Tribe's royalty interests from the royalty payments to the Tribe or received

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12 Suits for refund have been filed by Blackleaf Petroleum Co., Montana Power Co., Union Oil Company of California, and Murphy Oil Corp. The Blackfeet Tribe is not a party to any of these suits.

credit for taxes paid which were attributable to tribal royalty.[13] The producers have followed their Montana statutory remedies. Since January, 1979, when the first payments under protest began, a total of ninety-six separate actions have been filed in Montana and stayed pending the outcome of this case. More than five million dollars in taxes have been paid under protest.[14]

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13 See n.7, supra.

14 Not all producers are challenging all taxes at issue here. The producers who are challenging various taxes apparently challenge both the producer's share and the share which might be attributed to the royalty interest. Thus, the amount at issue in this case is different from the amounts paid under protest. The Montana Department of Revenue has made a rough estimate of taxes at issue here collected between 1975 and 1982 as follows: Net Proceeds Tax, $2,314,000.00; Resource Indemnity Trust Tax, $68,400.00; Severance Tax, $425,400.00; Board of Oil and Gas Conservation Tax, $12,700.00.

Resolution of the question of whether the 1924 Act authorizes the State to impose these taxes is appropriate and necessary now. The Ninth Circuit remanded this case to the district court for trial. Trial will not dispose of or affect the outcome of this purely legal question. A ruling on the question now may make trial unnecessary. A ruling now would prevent the likelihood of disparate results in the ninety-six tax refund cases now pending in various Montana courts, with their attendant appeals.

In addition, the Ninth Circuit opinion that production under 1938 Act leases may not be taxed by the states raises serious problems for other states. Numerous cases are pending in state and federal courts in Arizona and New Mexico dealing with that question, and can be determined by this case. In New Mexico,

there are six cases pending before the Santa Fe County District Court whose outcome could be substantially affected by this Court's decision in the present case. Two of these cases challenge various state resource and property taxes on the production of uranium on the Navajo Reservation; two other cases contest the state's power to tax oil and gas production on the Navajo Reservation in light of Navajo taxes; and the last two cases (one of which consists of five consolidated cases) contest the state's taxes on oil and gas production on the Jicarilla Apache Reservation. Currently pending in Arizona state court is a major case in which a coal producer mining coal from the Navajo Reservation is challenging Arizona's taxes on production. At issue are more than $25,000,000 to date.

This Court's review of the instant case will prevent the likelihood of varying opinions and the repetition of lengthy and costly litigation on the same subject in Montana and elsewhere.

3. <u>Congress' Authorization of State Taxation Under the 1924 Act Is Clear and Remains Intact</u>.

The clear language of the 1924 Act authorized taxation of Indian interests in mineral development, such as rents and royalties, as long as the taxes do not become a lien against the land or other property of the Indians. Unless the provision authorizing state taxation has been repealed, that provision authorizes the State to impose its taxes on oil and gas production on the Blackfeet Indian Reservation. The Ninth Circuit ruled that for all leases entered into since 1938, the taxation provision of the 1924

Act was essentially "replaced" by silence of the 1938 Act, and that the silence, when read together with the policy of the I.R.A., Indian Reorganization Act, amounted to a lack of Congressional authority to tax. "Replacement" is, of course, tantamount to repeal of the 1924 Act's taxation authority.

In order to facilitate adoption of the "replacement" approach, the Ninth Circuit refused to apply customary rules of statutory construction which, if applied, compel the conclusion that the 1924 Act's taxation authority remains in force. The court held that "resort to conventional canons of construction yields inconsistent results," because of the countervailing canon that Indian legislation is "to be construed liberally in [the Indians'] favor." (App. 6, 7 n.3.) As discussed in part 4 _infra_, other courts have used canons of construction in Indian cases, contrary to the Ninth Circuit's conclusion that the canons were only guideposts which the court found impossible to apply. (App. 41.)

When two statutes have provisions on the same subject matter, certain rules of statutory construction apply. First, there is a strong presumption against repeals by implication. _United States v. Borden Co._, 308 U.S. 188, 198 (1939); _Frost v. Wenie_, 157 U.S. 46, 58 (1895). In _United States v. Greathouse_, 166 U.S. 601, 605 (1877), the Supreme Court said:

> But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and they are not absolutely irreconcilable, effect should be given, if possible, to both of them.

It is also well settled that the courts will not use a strained construction of a

statute in order to find an inconsistency. <u>United States v. Noce</u>, 268 U.S. 613, 619 (1925). Inconsistency is never presumed, and will not be found if any other reasonable construction exists. <u>Frost v. Wenie</u>, 157 U.S. at 58. There is no inconsistency between the express authorization to tax in the 1924 Act and the silence on taxation in the 1938 Act. The taxation authority in the earlier act is intact for leases entered into after the 1938 Act.

Nonetheless, the Ninth Circuit ignored these canons of construction and used a strained reading of the 1938 Act in order to find that Congress' silence on the taxation authority meant that Congress intended there be no taxation. The court then refused to assign any significance to the general repealer provision in the 1938 Act that "All Act

or parts of Acts inconsistent herewith are hereby repealed."

The standard construction of a general clause repealing only "inconsistent acts" is that such a clause is "an express limitation of the repeal to inconsistent acts." 1A C. Sands, <u>Sutherland Statutory Construction</u> § 23.08 at 221 (4th ed. 1972). In <u>Hess v. Reynolds</u>, 113 U.S. 73, 79 (1885), this Court held that such a clause "implies very strongly that there may be acts on the same subject which are not thereby repealed." The inclusion of such a clause in the 1938 Act "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." <u>United States v. Henderson</u>, 78 U.S. (11 Wall.) 652, 656 (1870). To the extent that the repealing clause means anything

at all, it means that the 1938 Act was not intended to be comprehensive to the exclusion of all existing statutes relating to mineral leasing of unallotted Indian lands. Congress well knew how to repeal the taxing provisions contained in the 1924 Act, but did not do so.

Under applicable rules of statutory construction, there is no need to examine the underlying unexpressed intent of Congress in passing the 1938 Act. If that sort of analysis is done, it is significant that although the authority for states to tax was an important feature discussed in passing the 1924 Act (S. Rep. No. 546, 68th Cong., 1st Sess. (1924), App. 322), there was no discussion at all of state taxation in passing the 1938 Act. However, there was testimony itemizing the specific provisions of previous mineral leasing

laws which Congress did want to correct or change. S. Rep. No. 614, 74th Cong., 1st Sess. (1935) (App. 332, 335-41) [hereinafter S. Rep. No. 614]; S. Rep. No. 985, 75th Cong., 1st Sess. (1937) (App. 343, 346-353) [hereinafter S. Rep. 985]; H. Rep. No. 1872, 75th Cong., 3d Sess. (1938) (App. 355) [hereinafter H. Rep. 1872].

The bill that became the 1938 Act was first introduced into Congress in 1934. S. 3565, 73d Cong., 2d Sess. (1934); H.R. 9427, 73d Cong., 2d Sess. 1934). The same bill was introduced in 1935, S. 2638, 74th Cong., 1st Sess. (1935), and was designed to remove Indian mineral leasing from the general mineral laws of the United States, and to give the government and various Indian tribes the authority to refuse mineral leases which they felt were not economically

advantageous to the tribes. The bill was supported by the Department of the Interior, which submitted letters in support of the legislation.[15] The bill was introduced in 1937 as S. 2689 and H.R. 7626. The Department of the Interior submitted substantially the same

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15 S. Rep. No. 614, App. 332, 333 (letter from T. A. Walters, Acting Secretary of the Interior, to Hon. Elmer Thomas, Chairman, Sen. Comm. on Indian Affairs, April 15, 1935). The letter summarized the lack of discretion in the Secretary of the Interior to reject leases of Indian lands under the general mineral statutes, despite the lack of adequate return to the Indians. The letter also stated: "The most urgent change is in the interest of leasing deposits of building stone, sand, gravel, coal, and many other minerals." (App. 339.) The letter concluded: "The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of unallotted Indian land for general mining purposes. <u>It will effect no change in the present law for leasing oil and gas</u> land and will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted." (Emphasis supplied) (App. 341-42).

letter in support of the legislation as had been sent in 1935.[16] S. 2689 was passed on May 11, 1938. While the Senate version of the final bill contained new language pertaining to posting of surety bonds and delineating the Secretary of the Interior's power over oil and gas mining, the available legislative history does not indicate any erosion of the state's taxing authority pursuant to the 1924 Act.

Nonetheless, as support for its conclusion that the 1924 tax authority was "replaced," the Ninth Circuit cited the letters from the Department of the Interior stating that the 1938 Act would "bring all mineral leasing matters in harmony with the Indian Reorganization

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16 S. Rep. No. 985 (App. 343); H. Rep. No. 1872 (App. 355).

Act." (App. 27) <u>See</u> n.15, <u>supra</u>. The court's use of that broad statement in order to find an implied repeal or replacement of the specific tax authorization provision flies in the face of common standards of statutory construction. Furthermore, as discussed in part 4 below, even if the 1938 Act is read to harmonize with the intent of the I.R.A., the Ninth Circuit Court of Appeals' conclusion is not supportable.

Finally, Congress has indicated several times that the tax authorization expressed in the 1924 Act is still in effect. Recent legislative proposals to limit state severance taxes to a 12.5 percent rate were applied to state severance taxes on coal "mined or produced on Indian lands or lands owned by the Federal Government...." S. 2695, 96th Cong., 2d Sess. (1980); H.R. 6625,

H.R. 6654, and H.R. 7163, 96th Cong., 2d Sess. (1980); S. 1778, 95th Cong., 2d Sess. (1979). Moreover, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 <u>et seq.</u>, provided in section 6 of the Act, 25 U.S.C. § 2105, that:

> Nothing in this chapter shall affect, nor shall any Minerals Agreement approved pursuant to this chapter be subject to or limited by, sections 396a to 396g of this title [the 1938 Indian Mineral Leasing Act], or <u>any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe.</u>

(Emphasis supplied.) These subsequent congressional actions show the continued vitality of the 1924 Act's tax authority.

4. <u>The Ninth Circuit Court of Appeals Misconstrued and Misapplied the Policy of the I.R.A. to Excise Judicially State Taxation Authority.</u>

As discussed above, the Ninth Circuit refused to apply standard canons

of statutory construction but decided instead to resort to an analysis of the language, purpose, and historical contents of both the General Allotment Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. §§ 331 to 334, and of the I.R.A. In doing so, the court apparently considered the administrative and legislative histories of the 1924 and 1938 Acts, the specific acts in question, irrelevant. The Ninth Circuit concluded that the 1924 Act reflected Allotment Act policies and programs and that the 1938 Act reflected I.R.A. policies and programs, interpreting the I.R.A. as a "complete about-face, [from the allotment program]...to reverse the effects of 47 years of federal Indian policy." (App. 19-20.)

The court applied its interpretation of the I.R.A. to the 1938 Act because one

stated purpose of the 1938 Act was to "bring all mineral leasing matters in harmony with the [I.R.A.]." (App. 27, citing S. Rep. No. 985, supra, and H. Rep. No. 1872, supra.) In fact, those congressional reports do indicate that this was a purpose of the 1938 Act. (App. 343, 347.) However, the court's construction of the policy and intent of the I.R.A. overriding the tax authority in the 1924 Act is completely unjustified. First, the I.R.A. was not intended to enlarge radically the power of the Indian tribes.[17] Second, there is

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17 The provision now contained in section 16 of the I.R.A. gave to "organized tribes various limited powers, all of which are presently enjoyed by some of the tribes under existing tribal organization." S. Rep. No. 1080, 73d Cong., 2d Sess. at 2 (1934). See also statement of J. Collier, Hearings on S. 2755 and S. 3645, part 2, Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) at 101, saying that there was really nothing new proposed in the legislation.

absolutely nothing in either the I.R.A. itself, or in the legislative history surrounding it, that shows any intent of Congress to override the statutory authorization for state taxation of minerals reserved for the Blackfeet Tribe or any other minerals included in the 1924 Act. Instead, the legislative history demonstrates a contrary intent, so that even if the general I.R.A. policies are used in construing specific earlier and later statutes, that analysis would not result in an end to the State's taxes pursuant to the 1924 Act.

The primary purpose of the I.R.A. was the reversal of the previous policy of allotting parcels of land to Indians under the allotment system. This purpose was to be achieved by preventing further loss of lands and by revesting certain types of land into tribal ownership.

Hearings on S. 2755 and S. 3645, part 2, Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) [hereinafter "I.R.A. Hearings"] at 153.[18] None of the discussion about the lands lost through the allotment system or the lands to be revested in tribes included mineral estates. The reason for this was that mineral deposits were not generally desired for individual allotments. <u>See</u> <u>British-American</u>, <u>supra</u>, 299 U.S. at 164;

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18 Congress viewed the allotment system as a failure and a disaster accounting for the loss of vast amounts of tribal lands. Testimony and reports submitted during the lengthy committee hearings on the I.R.A. show the reversal of the allotment system to be the primary purpose and objective of the I.R.A. <u>E.g.</u>, I.R.A. Hearings at 57, 61, 117, 133-34, 143, 147, 148, 153, 173, 183, 190. This testimony was so extensive that at one point in the Hearings, Senator Wheeler interrupted Commissioner Collier's questions on the failures of the allotment system to say "[W]e know what the situation is...." I.R.A. Hearings at 157.

I.R.A. Hearings at 153. The Blackfeet Tribe's minerals had long before been reserved from allotment or disposition and held for the benefit of the Tribe, Act of June 30, 1919, supra, so that the I.R.A. had no effect on the minerals' status. The desire of Congress to reverse the allotment policy through the I.R.A. did not alter the ownership status of minerals or Congress' earlier authorization to lease these minerals.

The I.R.A. did provide that lands, when revested in a tribe, would then become exempt from state and local taxation, and the tax exempt status of restricted lands was to be continued. I.R.A. § 6 (App. 162). The Ninth Circuit inferred from the commentary on the tax exemption of the vested and restricted lands an intent of Congress embodied in the I.R.A. to exempt all Indian property,

including minerals, from state taxation. The court then concluded that Congress intended to end state taxes authorized by the 1924 Act because, in its opinion, Congress intended in the I.R.A. that Indians become economically independent and self-sufficient.

The Ninth Circuit reached its conclusion without citing any language in the I.R.A. itself or in its legislative history directly supporting its conclusion. None exists. There is nothing in the I.R.A. or its legislative history indicating that the contemplated change in tax status concomitant with a change in ownership status would be extended to minerals whose ownership status was not being changed under the I.R.A. Without question, one I.R.A. purpose was to promote increased tribal autonomy and control over tribal

economics and tribal resources. The means specified by Congress to accomplish the goal of overcoming the Indians' past inability to make effective use of their land and natural resources was the establishment of an Indian credit system and fund. See, e.g., S. Rep. No. 1080 at 3; I.R.A. Hearings at 154, 168. Contrary to the Ninth Circuit's conclusion, the legislative history of the I.R.A. itself reveals no intention by Congress to encourage tribal autonomy by ending state taxation of mineral production on the Blackfeet or any other Indian reservation.

Another indication that the I.R.A. was not intended to override the state's taxation authority in the 1924 Act was the specific recognition by Congress during discussions of the I.R.A. of Congress' "power to subject tribal

property to taxation by local, state, or other authorities." Brief submitted by Commissioner of Indian Affairs Relating to Power of Congress Over Indians, I.R.A. Hearings at 268, 270. See also I.R.A. Hearings at 185.

In S. Rep. No. 1080, the specific purposes of the proposed I.R.A. were itemized in detail. It is significant that none of those purposes dealt in any way with elimination of states' power to tax mineral production on Indian reservations. In contrast to the silence of the legislative history on the states' tax authority over Indian mineral production, there were references to statutes which were outdated in light of new policies. For example, during the Senate committee hearings on the I.R.A., it was acknowledged that the then existing federal Indian liquor laws, 18

U.S.C. §§ 1154 and 1156, prohibiting liquor transactions in "Indian Country" or with Indians, had outlived their purpose and were contrary to common sense and national policy. I.R.A. Hearings at 200. Nonetheless, an explicit repeal by Congress in 1953 was required to nullify the absolute prohibition. 18 U.S.C. § 1161. If clear statements of Congressional policy made during the I.R.A. hearings were sufficient to override existing statutory provisions that were arguably inconsistent with the policy of the I.R.A., Congress' enactment of 18 U.S.C. § 1161 would have been unnecessary and inexplicable.

The Ninth Circuit bolstered its conclusion that the 1938 Act dispensed with state power to tax by misreading the legislative history to the 1924 Act. The court stated that the purpose and

incentive behind the 1924 Act, gleaned from "common themes" of various Congressional pieces of legislation, over a span of seventeen years (App. 15-18),[19] was to encourage non-Indian development and settlement on tribal lands, and that this purpose differed substantially from the purpose and incentive of the 1938 Act, which was to foster tribal autonomy. This perceived purpose and incentive is certainly not expressed in either the language of the 1924 Act or <u>its</u> legislative history. The express intent of the 1924 Act was to allow development of Indian leases, which were not being developed up until that time because of

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19 Curiously, none of the court's references for this proposition is in the 1924 Act, in the year 1924, or related to Congress' consideration or passage of the 1924 Act.

the ten-year time limitation on leases. Additionally, Congress was concerned that very frequently non-tribal tracts were developed adjacent to the tribal tracts, with the result of "drainage [from the tribal tract] in some instances." The bill was introduced at the request of the Department of Interior to cure that condition. S. 2314, 68th Cong. 1st Sess., Vol. 65 Part 9 Cong. Rec. 8597 (May 15, 1924).

The 1924 Act was enacted to encourage development for the benefit of the Indians. It was specifically stated by Congress that the money would go "into the tribal fund," and that the interest of the Indians would be protected by the Act. Ibid. The bill received a favorable report from the Indian Affairs Committee. Id. at 8710. In answer to a specific question on whether Indians

wanted the law on leasing changed, Senator McKellan answered, "I do not think there is any doubt about it. It has been found absolutely impracticable to handle oil and gas leases under the old mining law, which limited the leases to ten years." S. 2314, 68th Cong., 1st Sess., Vol. 65 Part 6 Cong. Rec. 5492 (Apr. 3, 1924).

The incentive and purpose of the 1924 Act, to have oil and gas on tribal lands developed and get returns for the Indians, is no different from the purpose of the I.R.A. to encourage Indians to become economically independent or the purpose of the 1938 Act, which included giving the Indians "the right to lease more lands so that the Indians can have more income." S. 2638, 74th Cong., 1st Sess., Vol. 79 Part 7 Cong. Rec. 7815 (May 20, 1935). The Ninth Circuit was

wrong in finding that the purposes and policies of the 1924 and the 1938 Acts were so different as to cause the elimination or replacement of the state taxation provision in the 1924 Act.

One post-1938 Act indication that neither Congress nor the Commissioner of Indian Affairs was concerned with eliminating the state's power to tax mineral production under the I.R.A. is a remark of Commissioner Collier on the I.R.A. In an annual report, 1941 Secr. Inter. Annual Report 451, Mr. Collier noted the lack of tribal economic improvement and independence despite the passage of the I.R.A., blaming Congress' refusal to appropriate the authorized funds for the sluggish economic improvement of the Indians. This assessment was made in 1941, when the taxes in question here were being

collected and after the Montana Board of Equalization had been successful in British-American, supra. Surely, if Mr. Collier perceived that these taxes were contrary to the purposes or intent of the I.R.A. or were responsible for the failure of tribes to develop economically, he would have attributed some blame for the failure on these taxes. Yet, in that annual report, the blame for the failure was placed on Congress for its refusal to appropriate authorized funds.

The Ninth Circuit's broad and incorrect construction of the I.R.A. and the application of this construction to the interpretation of the 1938 Act presents a serious federal question requiring review by this Court.

5. <u>The Ninth Circuit Court of Appeals Misconstrued Agency Opinion and Ignored the History of Administrative Practice</u>.

In concluding that the tax authority in the 1924 Act no longer exists, the Ninth Circuit had to overlook, and did in fact ignore,[20] the almost 40 years of consistent practice of authorizing and recognizing the power of the state to collect the taxes in question. The enactment of the 1938 Act had no effect

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20 The court did not ignore the existence of the various opinions of the Department of the Interior brought to its attention, which, prior to 1977, recognized that the State was collecting all of its oil and gas production in taxes for production on the Blackfeet Reservation, and authorized or acquiesced in that taxation. However, the court considered these to be informal, not necessarily on point, or perhaps wrong, in light of the Department's 1977 opinion in relation to mineral production on the Fort Peck Reservation, Montana.

upon the Department of Interior's interpretation that the 1924 Act's tax authorization continued in effect for post-1938 leases. The taxation did not go unquestioned, as is obvious from the series of memoranda and opinions on the topic. (App. 232-321.) The mechanism for collection of the taxes was troublesome, and the Department as an accommodation to the producers authorized the payment and collection mechanism whereby the producer paid the taxes and reduced the tribe's royalties by the amount of taxes paid on the tribe's royalties. (App. 243, 257.)

This long-standing practice, and the pre-1977 opinions from the Department of Interior, all show that the Department of Interior was aware of the taxation and was aware that some had questions about it, but nonetheless, the Department's

practice was to allow the taxes to be collected. This sort of interpretation by the Department charged with the administration of the 1938 Act must be given consideration and deference by courts. Rice v. Rehner, 103 S. Ct. 3291, 3301 n.13 (1983). Recently, this court in Aluminum Company of America v. Central Lincoln Peoples' Utility District, 52 U.S.L.W. 4719 (U.S. June 5, 1984), reminded us of the substantial deference which is to be given to the interpretation of the agency charged with administration of a statute. This deference should be accorded to the interpretation of the Department of Interior immediately following enactment of the 1938 Act, not the interpretation of 40 years later, because that interpretation represents:

> [A] contemporaneous construction of a statute by the men

> charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

Id. at 4719 (Citations omitted).

The Ninth Circuit's failure to consider and defer to the long-time administrative practice of allowing these taxes to be collected from 1938 up until 1977 merits review by this Court.

II. THE NINTH CIRCUIT'S CONSTRUCTION AND APPLICATION OF THE POLICY AND INTENT OF THE I.R.A. IN ORDER TO DEFEAT A STATUTORY PROVISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND THIS COURT.

After refusing to apply conventional canons of construction, the Ninth Circuit analyzed the policies and intent of the I.R.A. as the backdrop for interpreting the 1938 Act. The court held that one policy of the I.R.A. was to do away with states' power to tax and that this intent

determined the meaning of the tax provision at issue.

This type of analysis has been urged by Indians and Indian Tribes most recently in cases involving rights-of-way over allotted and tribal lands. Tribes have argued that section 16 of the I.R.A. (App. 170-72) requires tribal consent before any rights of way can be acquired. The Eighth and Tenth Circuit Courts of Appeal and this Court, however, have rejected requests to apply the policy and language of section 16 of the I.R.A. in interpreting earlier and later statutes dealing with condemnations of various rights-of-way. No court, except the Ninth Circuit in the instant case, has found it impossible or necessarily leading to inconsistent results to resort to conventional canons of construction

when two statutes on the same subject involve Indians.

In Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956, 960-61 (8th Cir. 1983), rev'g 540 F. Supp. 592 (D. Neb. 1982), the Eighth Circuit used conventional canons of construction to find that there had been no implied repeal of a 1901 statute allowing condemnation of allotted lands, 25 U.S.C. § 357, despite a 1948 statute, 25 U.S.C. §§ 323-28, which conditioned condemnation of a right-of-way across allotted Indian land upon secretarial or individual allottee consent. The Eighth Circuit reversed the district court which held that the I.R.A. policies of encouraging tribal self government and preservation of the Indian land base compelled the conclusion that the later act requiring

consent completely supplanted the earlier Act. Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 540 F. Supp. at 597 and 600.

The Tenth Circuit has used standard canons of construction to construe the same two statutes, holding that condemnation of allotted lands without consent is possible under 25 U.S.C. § 357. Yellowfish v. City of Stillwater, 691 F.2d 926, 928-29 (10th Cir. 1982), cert. denied, 51 U.S.L.W. 3828 (U.S. May 17, 1983). That Court also rejected the argument that the policy of the I.R.A. conflicted with and overrode the 1901 condemnation provision. 691 F.2d at

930.[21]

Moreover, this Court has also declined to apply policies of the I.R.A. to override specific statutory provisions involving Indians, reversing recent decisions of the Ninth Circuit. In Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, 52 U.S.L.W. 4588 (U.S. May 15, 1984), aff'g in part and rev'g in part 692 F.2d 1223 (9th Cir.

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21 The Ninth Circuit Court of Appeals itself has held with regard to 25 U.S.C. § 357 allowing condemnation that there was no repeal by the later statute requiring consent even though "the United States' policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made." Southern California Edison Co. v. Rice, 685 F.2d 354, 356 (9th Cir. 1982), cert. denied, 103 S. Ct. 1497 (1983).

1983), this Court declined to follow the analysis of the Ninth Circuit that the I.R.A. and another earlier Indian statute required that tribal (or band) consent be required before licenses can be issued by the Federal Energy Regulatory Commission on trust lands. Instead, this Court held that "absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive" [citation omitted], and that Congress' clear intent is "to be given effect unless there are clear expressions of legislative intent to the contrary." 52 U.S.L.W. at 4590.

Last year, this Court declined to apply the policy of the I.R.A. to federal Indian liquor statutes, Rice v. Rehner, 103 S. Ct. 3291 (1983), rev'g 678 F.2d 1340 (9th Cir. 1982). Eva Rehner argued the I.R.A. policy should be applied in

order to find that Congress intended that states lack jurisdiction over Indian country liquor licensing and distribution. Respondent's Brief on the Merits at 11, Rice v. Rehner.

The Ninth Circuit's opinion, misapplying I.R.A. policies in order to find a repeal or replacement of a statute affecting Indians, conflicts with the opinions of this Court and of the Eighth and Tenth Circuits. This conflict merits review.

CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No. 83-_______

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,
Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

BLACKFEET TRIBE of INDIANS,

Plaintiff-Appellant,

v.

STATE OF MONTANA, DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE, GLACIER COUNTY, MONTANA, and PONDERA COUNTY, MONTANA,

Defendants-Appellees.

No. 81-3041
United States Court of Appeals,
Ninth Circuit
Appeal from the United States
District Court for the
District of Montana
Hon. Paul G. Hatfield, Presiding

Argued and Submitted En Banc:
November 16, 1983
Decided April 3, 1984

BEFORE: GOODWIN, WALLACE, KENNEDY, ANDERSON, FLETCHER, FARRIS, PREGERSON, CANBY, BOOCHEVER, NORRIS and REINHARDT, Circuit Judges.

FLETCHER, Circuit Judge:

This case involves the scope of state authority to tax the proceeds of tribal mineral leases, and requires that we examine a series of congressional enactments regulating the leasing of tribal land for oil and gas production.

Between 1932 and 1968, the Blackfeet Tribe executed 125 leases authorizing the mining of oil and gas on tribal land located within the Blackfeet Indian Reservation. Approximately 12 of the leases were made under the authority of the Act of February 28, 1891, ch. 383, 26 Stat. 795, as amended by the Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. §§ 397-98 (1976)). The balance of the leases were made under the authority of the Act of May 11, 1938, ch. 198, 52 Stat. 347 (codified at 24 U.S.C. §§ 396a-396g (1976)). All 125 leases remain in operation today and will

continue until the oil and gas supply is exhausted. The Tribe is paid royalties calculated on the basis of the amount of gas or oil produced under the leases. The State of Montana imposes four distinct taxes on the Tribe's royalty interests, without distinguishing between the royalties collected pursuant to 1938 Act leases and the royalties collected under 1891 Act leases. See Mont. Code Ann. §§ 15-36-101 to -121 (1981) (Oil and Gas Severance Tax); Mont. Code Ann. §§ 15-38-101 to -109 (1981) (Resource Indemnity Trust Tax); Mont. Code Ann. §§ 82-11-131 to -132 (1981) (Oil and Gas Conservation Tax); Mont. Code Ann. §§ 15-23-601 to -612 (1981) (Oil and Gas Net Proceeds Tax). Montana assesses the Tribe's share of all four taxes against the producer-lessees, who then deduct it from the royalties payable to the Tribe.

In 1977, the Solicitor of the Department of the Interior issued an opinion concluding that Montana was entitled to tax the production of oil and gas under 1891 Act leases, but could not tax tribal proceeds from 1938 Act leases. Tax Status of The Production of Oil and Gas from Leases of The Fort Peck Tribal Lands Under The 1938 Mineral Leasing Act, 84 Interior Dec. 905 (1977).[1] Montana continued to assess taxes against the

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1 Montana insists that no deference is due the interpretation of the Interior Department because its position in the six years since 1977 contradicts its position during the prior fifty years. Montana greatly overstates its case. Only two unpublished opinions, one in 1956 and a second in 1966, contradict the Department's current interpretation. See infra Section III. The other decisions on which Montana relies were either decided prior to the enactment of the 1938 leasing statute or concerned the taxation of leases issued under prior statutes. See 84 Interior Dec. at 911.

Tribe's royalty interests under all 125 leases. In 1978, the Tribe filed an action in federal court seeking to enjoin Montana's taxation of tribal royalties. The district court entered summary judgment for the State of Montana, holding that the 1924 amendment to the 1891 Act expressly authorized state taxation of production of oil and gas on Indian lands, and that the 1938 Act left that authority undisturbed.

A panel of this court affirmed the district court's decision. We ordered a rehearing en banc in order to resolve a conflict between the opinion and our decision in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 230 (1982).

Montana argues on appeal that Congress consented to the imposition of its taxes in the Act of May 29, 1924. The Tribe concedes that the 1924 Act expressly consented to taxation of oil and gas production on Indian land, but argues that the 1924 Act was implicitly repealed by section 7 of the Act of May 11, 1938.[2] Alternatively, the Tribe argues that the consent to taxation found in the 1924 Act is inapplicable to production of oil and gas under leases governed by the 1938 Act. The legislative history of the two statutes contains little explicit guidance, and resort to conventional "canons of construction"

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2 Section 7 provides: "All Act or parts of Acts inconsistent herewith are hereby repealed."

yields inconsistent results.[3] Our resolution of this difficult issue requires a thorough analysis of the language, purpose and historical contexts of both statutory schemes.

I

We begin with the well settled principle that state taxation of tribal income from activities carried on within the boundaries of the reservation is impermissible unless Congress has expressly consented to the imposition of the tax. See Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated

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3 The Tribe calls our attention to the canon that Indian legislation is to be construed liberally in favor of Indians and ambiguities to be resolved in their favor. Montana invokes the rule that repeals by implication are disfavored, insisting that courts must construe potentially inconsistent statutes so as to give both statutes effect.

Salish & Kootenai Tribes, 425 U.S. 463 (1976). We must resolve whether the 1924 Act explicitly consented to the taxes here at issue. The consent to taxation contained in the 1924 Act was part of an amendment to the Act of February 28, 1891, ch. 383, 26 Stat. 794, which was itself an amendment to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388. The 1924 Act was one of a series of similar statutes providing for non-Indian leasing and development of Indian lands within the context of the policies embodied in the General Allotment Act. See, e.g., Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34 (codified as amended at 25 U.S.C. § 399 (1976)); Act of September 20, 1922, ch. 347, 42 Stat. 857

(codified at 25 U.S.C. § 400 (1976)).[4] Our analysis therefore begins with the program reflected in the General Allotment Act of 1887, and Congress's efforts to effectuate it.

The primary purpose of the General Allotment Act was the speedy assimilation of the Indians. See generally 17 Cong. Rec. 1630-35, 1762-64 (1886); F. Cohen, Handbook of Federal Indian Law 128-32 (1982). Each Indian was to receive an allotment of land, to be held in trust

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4 See also Appropriations Act of March 3, 1909, ch. 263, 35 Stat. 781, 783 (codified at 25 U.S.C. § 396 (1976)); Act of April 28, 1924, ch. 135, 43 Stat. 111 (codified at 25 U.S.C. 401 (1976)); Act of April 17, 1926, ch. 156, 44 Stat. 300 (codified at 25 U.S.C. § 400a (1976)); Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. § 398a (1976). See generally United States Department of the Interior, Federal Indian Law 115-127 (1958); F. Cohen, Handbook of Federal Indian Law 132-43, 528-29 (1982).

for 25 years.[5] The Forty-Ninth Congress envisioned a period during which the Indians would be "civilized" and the tribal system destroyed, after which the Indians would succeed to fee ownership of their lands and all of the privileges and obligations of citizenship. See, e.g., 17 Cong. Rec. 1632 (1886) (remarks of Mr. Maxey); id. at 1763 (remarks of Mr. Dawes); F. Cohen, supra, at 131-32; G.D. Taylor, The New Deal and American Indian Tribalism 4-5 (1980). The Act further provided for the sale of surplus land, and the use of the proceeds for the education and civilization of members of the tribes.[6]

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5 The trust period was subject to extension by the President, and was subsequently extended. See Appropriations Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (codified at 25 U.S.C. § 391 (1976)).

6 See F. Cohen, supra note 4, at 131-32. During the first ten years of

In 1891, Congress responded to public pressure to open reservation land for settlement and mining by amending the allotment act to permit short term leases of unallotted lands and lands allotted to aged and disabled allottees. See Act of February 28, 1891, ch. 383, § 3, 26 Stat. 794, 795; F. Cohen, supra, at 134-35.[7] In 1910, Congress enacted a measure permitting short term leasing of allotted lands and directing the Secretary of the

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(Footnote 6 continued) allotment, 55 million acres of "surplus" land were sold to white settlers. See G. D. Taylor, The New Deal and American Indian Tribalism 5 (1980). See also 78 Cong. Rec. 11134-37 (1934) (debate on effect of S. 3645, 73d Cong., 2d Sess., on surplus lands provision of 1887 Act).

7 Minor relaxations in the restrictions on such leases were enacted over the next 20 years. See Appropriations Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 305; Appropriations Act of May 31, 1900, ch. 598, § 1, 31 Stat. 221, 229 (codified at 25 U.S.C. § 395 (1976)). See generally F. Cohen, supra note 4, at 135.

Interior to supervise the expenditure of funds earned under the leases.[8] See Act of June 25, 1910, ch. 431, § 4, 36 Stat. 855, 856. The Indian Appropriations Act of 1919 included comprehensive provisions permitting long term mineral leasing of unallotted lands in western states. See Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34 (codified as amended at 25 U.S.C. § 399 (1976)). The Act of May 29, 1924, ch. 210, 43 Stat. 244, extended the terms of 1891 Act oil

8 See G.D. Taylor, supra note 6, at 6:

During the trust period the allotted land could be leased, and Indians were encouraged to lease their lands for relatively modest fees. In the case of the Civilized Tribes in Oklahoma, local real estate agents selected the sites for allotment, then rented the land from the Indians and sublet it at a profit to white farmers. In other cases the [Bureau of Indian Affairs], as trustee, administered the leases but failed to ensure that the Indians received the maximum possible rent from the land.

and gas production leases from a ten-year period to "as long as oil or gas shall be found in paying quantities," authorized the Secretary of the Interior to enter into further oil and gas leases for the extended period, and consented to state taxation of mineral production on unallotted lands "bought and paid for" by the Indians. See British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936).[9] Between 1920 and

9 In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164-65 (1936), the Supreme Court construed the "bought and paid for" language to apply to unallotted land within treaty reservations, including unallotted reserved mineral rights in or under allotted lands. The Court held that the 1924 Act's consent to taxation extended to mineral leases issued under the Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 (codified as amended at 25 U.S.C. § 399 (1976)). Id. at 166. We believe that the British-American Court's interpretation of the statutory language of the 1924 Act is problematic. See F. Cohen, supra note 4, at 409 n.40, 529 n.5. We follow it

1930, several other statutes were enacted to permit the leasing of additional categories of reservation land.[10]

All of these leasing provisions had a number of common features. The leases

(Footnote 9 continued) with respect to leases issued before the enactment of the 1938 statute. In view of our interpretation of the 1938 Act, we need not reach the question of whether the Court's 1936 analysis applies to the 1938 Act. See id. at 529 n.5.

10 See Act of March 3, 1921, ch. 119, 41 Stat. 1225, 1249 (Quapaw Reservation); Act of March 3, 1921, ch. 120, 41 Stat. 1249, 1250 (Osage Reservation); Act of Sept. 20, 1922, ch. 347, 42 Stat. 857 (codified at 25 U.S.C. § 400 (1976)) (unallotted lands in Fort Peck and Blackfeet Reservations); Act of April 28, 1924, ch. 135, 43 Stat. 111 (codified at 25 U.S.C. § 401 (1976)) (unallotted lands in Kaw Reservation); Act of May 26, 1926, ch. 403, § 6, 44 Stat. 658, 659-60 (Crow Reservation); Act of July 3, 1926, ch. 787, 44 Stat. 894 (codified at 25 U.S.C. § 402a (1976)) (unalloted irrigable lands for farming purposes); Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. 398a-398e (1976)) (unallotted lands on executive order reservations). The 1927 Act and both 1921 Acts expressly consented to state taxation; the other four Acts did not.

were regulated and approved by the Secretary of the Interior.[11] The proceeds were paid to the Secretary of the Interior and disbursed, by congressional appropriation, for the benefit of the Indians. The tribes had no authority to police or cancel leases or to direct the purposes for which revenue earned under the leases would be spent. See generally F. Cohen, supra, at 533-34.

The legislative history of these enactments reflects certain common themes. Congress evinced concern about

11 Leases entered into under the 1891 Act were to be granted "by authority of the council speaking for such Indians . . . subject to the approval of the Secretary of the Interior." Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 794, 795. The 1924 Act amended the procedure to provide for leasing at public auction "by the Secretary of the Interior with the consent of the council speaking for such Indians." Act of May 29, 1924, ch. 210, 43 Stat. 244. The 1919 Act made no provision for tribal consent.

the increasing size of Indian appropriations, and desired that a greater portion of the federal expenditures be made from the Indians' funds. See, e.g., H. Rep. No. 1791, 69th Cong. 2d Sess. (1927); 68 Cong. Rec. 4574-75 (1927) (remarks of Mr. Letts); 58 Cong. Rec. 175 (1919) (remarks of Mr. Snyder); id. at 207-08 (colloquy); F. Cohen, supra, at 135-36. Representatives expressed frustration at the fact that the assimilation sought under the General Allotment Act failed to proceed with the contemplated dispatch. See, e.g., 68 Cong. Rec. 4704 (1927) (remarks of Mr. Morrow); 58 Cong. Rec. 174-75 (1919) (remarks of Mr. Snyder). States complained that reservation lands were remaining tax exempt for too long a period, see 58 Cong. Rec. 180-81 (1919) (remarks of Mr. McKeown); id. at 184 (remarks of Mr. Howard); 45 Cong. Rec

6079 (1910) (colloquy), and urged strenuously that the lands be opened for increased non-Indian development and settlement. See, e.g., 68 Cong Rec. 4575 (1927) (remarks of Mr. Frear); 58 Cong. Rec. 181 (1919) (remarks of Mr. McKeown); id. at 216 (remarks of Mr. Carter); 45 Cong. Rec. 6096 (1910) (remarks of Mr. McGuire); F. Cohen, supra, at 128, 134-35.

The 1924 Act was responsive to these concerns. By extending the period of oil and gas production leases it encouraged further non-Indian development of reservation lands. The revenue thereby produced became available to reimburse the Treasury for its appropriations for the Indians' "education" and "civilization" -- measures that Congress hoped

would speed assimilation.[12] The consent to taxation placated states impatient with the Indians' tax-exempt status.[13] See S. Rep. No. 546, 68th Cong., 1st Sess. (1924); 65 Cong. Rec. 6844 (1924) (Remarks of Mr. Hastings); see generally F. Cohen, supra, at 134-42, 533-34; United States Department of the Interior, Federal Indian Law 125-26 (1958).

In 1934, Congress repudiated the allotment program. After studying its implementation, members of the Congressional Committees on Indian Affairs concluded that the results of the program

12 See generally 58 Cong. Rec. 173-77 (1919); F. Cohen, supra note 4 at 139-41.

13 See generally Loss of Revenue - Tax Exempt Indian Lands: Hearing on S. Res. 168 before the Senate Comm. on Indian Affairs, 75th Cong., 3d Sess. (1938), for accounts of unsuccessful state attempts to tax oil and mineral production on reservation lands during the early part of the twentieth century.

had become "a scandal and a blot on our name in every part of the world." 78 Cong. Rec. 11727 (1934) (remarks of Mr. Howard). See also id. at 11126 (remarks of Mr. King); id. at 11743 (remarks of Mr. Frear).[14] In a complete about-face, Congress enacted legislation to reverse

14 Congressman Howard, a sponsor of the Indian Reorganization Act, described the allotment program as follows:

> In the debates that accompanied the passing of the allotment act, it is clear that the proponents of this measure were convinced that the private ownership of land was the one great step that was needed to civilize the Indians. The mere issuance of a fee patent would give to the Indians pride of ownership, thrift, industry, and the means of self-support; it would break down the tribal status of the Indians and convert them into typical American citizens; it would, they said, solve the Indian problem, and in the course of a single generation relieve the Government of the immense and costly burden of caring for its Indian wards. There were, to be sure, a few farsighted men who predicted that the allotment law would lead to the economic ruin of the Indians, but their voices were

the effects of 47 years of federal Indian policy. The Indian

(Footnote 14 continued) lost in the chorus of optimism which accompanied the passage of the allotment act.

. . .

The allotment act, so far from being a means of civilizing the Indians soon became a perfect tool for the capture of Indian lands....

. . .

As a result of this system, the allotted Indian reservations are in general riddled by alienations, the extent of the alienation being almost exactly proportionate to the length of time since the original allotment was made. The Indians of many tribes have lost practically every square foot of land they owned. Many reservations have in Indian ownership a mere fragment of the original land and all the remaining allotted reservations are badly checkerboarded....

. . .

This poverty contributes largely to the excessive death rate among the Indians, which, in the case of tuberculosis, a disease closely associated with under-nourishment, is more than seven times the death rate from tuberculosis among the whole population.

Reorganization Act [IRA], ch. 576, 48 Stat. 984 (1934) (codified as amended at

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(Footnote 14 continued)

. . .

Although many thousand of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy -- absolutism built up on the most rigid bureaucratic lines, irresponsible to the Indians and to the public, shackled by obsolete laws; resistant to change, reform, or progress; which, over a century, has handled the Indians without understanding or sympathy, which has used methods of repression and suppression unparallelled in the modern world outside of Czarist Russia and the Belgian Congo.

78 Cong. Rec. 11727-29 (1934).

25 U.S.C. §§ 461-479 (1976)), prohibited further allotment of Indian land, sought to return to the Tribes some portion of the 90 million acres of Indian land that had passed into non-Indian ownership under the allotment program, and authorized tribes to establish tribal governments with authority over the development and exploitation of Indian land and resources. Tribes that elected to organize under the Act were entitled "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ." IRA § 16, 48 Stat. 984, 987 (codified at 25 U.S.C. § 476 (1976)). Among the purposes of the IRA were the promotion of a significant increase in tribal autonomy and authority and the extension to the tribes of "an opportunity to take over

the control of their own resources." 78 Cong. Rec. 11123-25 (1934) (remarks of Mr. Wheeler). See Morton v. Mancari, 417 U.S. 535, 542 (1974); F. Cohen, supra, at 147. The tax exempt and trust status of unallotted and restricted reservation lands was continued indefinitely, a provision that induced at least one state to insist that tribes within its borders be excluded from the Act. See 78 Cong. Rec. 11126 (1934) (remarks of Mr. Thomas); IRA § 13 (codified at 25 U.S.C. § 473 (1976)).[15]

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15 The district court noted that another purpose of the IRA was to enable Indians to enter the economic world on an equal footing. See, e.g., 78 Cong. Rec. 11730-31 (1934) (remarks of Mr. Howard). The IRA sought to accomplish this goal by authorizing tribes to form corporations, establishing a revolving credit fund for the benefit of these tribal corporations and their members, authorizing the purchase of additional land destined for tax-exempt Indian ownership, extending the tax-exempt and restricted status of existing unallotted Indian holdings,

Congress recognized that the various statutory provisions permitting leasing

(Footnote 15 continued) appropriating funds for college and technical education, and increasing Indian participation in and management of livestock and timber operations on tribal land. Id.; see also id. at 11123 (remarks of Mr. Wheeler).

Congress intended to effectuate increased tribal independence and economic power, but did not envision giving up federal responsibility for supervising these developments and providing necessary services for the Indians, and did not intend to turn its responsibility over to the states. Indeed, much of the opposition to the legislation was premised on its failure to reject protectionist policies. See, e.g., id. at 11126-27 (remarks of Mr. King); id. at 11733 (remarks of Mr. Kelley).

In the same legislative session, Congress enacted the Johnson-O'Malley Act, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 452-54 (1976)), authorizing the Secretary of the Interior to contract with state governments for the provision of education, health care, agricultural assistance and social services to Indians at federal expense. The legislative history of the Johnson-O'Malley Act indicates that Congress envisioned the federal government's paying states to provide these benefits to Indians living in widely scattered communities where

of tribal land were scattered, inconsistent, and in conflict with the provisions of the IRA giving the tribes

(Footnote 15 continued) maintenance of separate federal services and facilities would be impractical. See S. Rep. No. 511, 73d Cong. 2d Sess. (1934). A letter from Bureau of Indian Affairs Commissioner Collier, incorporated in the Senate Report, discloses that the Bureau anticipated that it would continue to provide services directly to Indians living in large tribal communities, unless the Indians themselves sought to take advantage of the possibility of state contract services. See id. at 4. Indeed, the Appropriations Act of March 2, 1934, ch. 38, 48 Stat. 362, 366-79, had allocated several million dollars in federal and tribal funds for Indian education, and three million dollars for Indian health services, see 48 Stat. at 3771-76; see also 78 Cong. Rec. 821-22 (remarks of Mr. Howard).

The Appropriations Acts for the period following the enactment of the IRA demonstrate Congress's continuing commitment to the principle that education, health care, social services and tribal police, firefighters and courts should be provided through a combination of federal and tribal funds. See, e.g., Appropriations Act of August 9, 1937, ch. 570, 50 Stat. 564, 574-90; see also, e.g., 81 Cong. Rec. 4515-16 (remarks of Mr. Johnson); id. at 4589-90 (remarks of Mr. Burdick). We conclude, from our examination of the IRA and the statutes

authority to prevent leasing of tribal lands. In 1935 Congress considered, but did not enact, a bill intended to amend existing leasing statutes to permit tribal councils to grant leases for the mining of unallotted lands, subject to the approval and regulations of the Secretary of the Interior.[16] Ultimately, Congress decided to replace, rather than amend, existing leasing laws. In 1937,

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(Footnote 15 continued) Congress enacted during the same period, that Congress did intend the IRA to assist Indians in achieving some measure of economic parity. It is manifest, however, that Congress did not intend for Indians to be dependent upon state governments for the benefits and services state governments traditionally provide.

16 S. 2638, 74th Cong., 1st Sess. (1935). See 79 Cong. Rec. 6102, 7350, 7815, 8307, 8308, 8481 (1935).

after extensive hearings on the conditions under which Indians were living,[17] the Senate and House Committees on Indian Affairs introduced bills to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act." See S. Rep. No. 985, 75th Cong., 1st Sess. 3 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938). The Senate Bill was enacted as the Act of May 11, 1938.[18]

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17 See, e.g., Survey of Conditions of the Indians in the United States: Hearings before a Subcomm. of the Senate Comm. on Indian Affairs, 75th Cong., 1st Sess. (1937); Survey of Conditions of the Indians in the United States: Hearings before a Subcomm. of the Senate Comm. on Indian Affairs, 74th Cong., 2d Sess. (1936); Conditions of Indians in the United States: Hearings before the House Comm. on Indian Affairs, 74th Cong., 2d Sess. (1936); Indian Conditions and Affairs: Hearings before the Subcomm. on General Bills of the House Comm. on Indian Affairs, 74th Cong., 1st Sess. (1935).

18 The 1938 Act provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in

It replaced the prior mineral leasing statutes with a comprehensive and detailed procedure for mineral leasing

(Footnote 18 continued)
Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians, under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil- and/or gas-mining purposes covering such uanllotted [sic] lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to

of unallotted lands. See F. Cohen, supra, at 534. The Senate Report accompanying the bill noted that its

(Footnote 18 continued)
complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said

purposes were to obtain uniformity

(Footnote 18 continued)
Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any

with respect to the leasing of tribal lands, give Indians authority in granting

(Footnote 18 continued)
restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act or parts of Acts inconsistent herewith are hereby repealed.

Act of May 11, 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g (1976)).

Six reservations were excluded from the operation of much of the Act. These included the Papago Reservation, subject to special mineral leasing provisions of section 3 of the IRA, and the Crow Reservation, which voted against organizing under the IRA, *see* G. D. Taylor, *supra* note 6, at 33, and which was subject to leasing under the provisions of the Act of May 26, 1926, ch. 403, § 6, 44 Stat. 658, 659. Also excluded were lands that the Shoshone Reservation had ceded to the United States, and three Oklahoma reservations that had been excluded from the IRA. The Crow and Papago reservations were ultimately made subject to the 1938 Act's provisions.

or denying leases, and enable the Indians to gain the greatest return from their property. S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937). The Act made no mention of taxation, and the legislative history is silent on the issue.

II

The Tribe argues that the 1938 Act's general repealer clause implicitly repealed the 1924 consent to taxation. We disagree. Many of the leases entered into under the authority of earlier statutes remained effective, indeed, remain effective today, because the prior statutory provisions authorized leases to continue for an indefinite term. See

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(Footnote 18 continued) See Act of May 27, 1955, ch. 106, § 1, 69 Stat. 67; Act of May 17, 1968, Pub. L. 90-308, 82 Stat. 123. See generally P. Maxfield, M. Dieterich & F. Trelease, Natural Resources Law on American Indian Lands 164 (1977).

Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 ("irrevocable" with certain exceptions); Act of May 29, 1924, ch. 210, 43 Stat. 244 ("as long as oil or gas shall be found in paying quantities"). The 1938 Act expressly limits its application to leases entered into after the Act's effective date. In section one, the Act provides that "hereafter unallotted lands . . . may . . . be leased for mining purposes. . . ." The "hereafter" language is echoed in section 3 of the Act. Finally, section 4 of the Act provides that "operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior." (Emphasis supplied). We

infer from the statutory language that Congress envisioned that leases issued pursuant to prior acts would continue to be effective for their duration, subject to regulations promulgated by the Secretary and to the statutes under which they were executed. Leases made after the effective date of the Act, however, were to be governed by the new terms and procedures.[19] This interpretation, we believe, is both the most natural reading

19 We acknowledge that the statutory language is susceptible to more than one interpretation. The 1938 Act excludes six Indian tribes from its scope and, in addition, expressly preserves the authority of tribes organized under the IRA to lease lands for mining purposes according to the provisions of their tribal constitutions or charters. See supra note 17. The reference to leases issued pursuant to "any other statute" might thus be read to refer only to the IRA and statutes affecting the six excluded tribes. We feel constrained to reject this interpretation because it makes no provision for extant, indefinite-term leases entered into under prior statutes.

of the statutory language and the reading best adapted to the effectuation of the statute's purposes. To infer repeal of the prior statutes on the basis of the general repealer in section 7 of the Act would introduce serious uncertainty as to the legal status of the indefinite-term leases executed under earlier acts and cast doubt on the Secretary's authority to continue to regulate them. Such a result would serve neither the interests of the Tribe nor the interests of the producer-lessees.

Having concluded that the 1938 Act superseded but did not repeal prior leasing statutes, we turn to the current effect of the consent to taxation contained in the 1924 amendment to the 1891 Act. We hold that leases executed pursuant to the 1891 and 1924 Acts remain subject to those Acts, and to the

regulations promulgated by the Secretary under the authority of section 4 of the 1938 Act for regulation of leases issued "pursuant to the terms of this or any other Act." It follows that the 1924 Act's consent to state taxation remains effective with respect to leases executed under the 1924 and 1891 Acts.[20] We therefore affirm the district court's grant of summary judgment to the State of Montana insofar as it upholds the validity of taxing tribal proceeds from 1924 Act and 1891 Act leases.

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20 Professor Cohen's treatise suggests a similar interpretation:

> The [1938] Act omits any taxing authorization and includes a provision repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." The latter provision likely repealed the prior leasing Acts to which the tax consents had related (as to new leases).

F. Cohen, supra note 4, at 409 (emphasis supplied; footnotes omitted).

III

Montana argues that if the 1938 Act did not implicitly repeal the 1924 Act, it must be read implicitly to have incorporated the 1924 Act. Therefore, Montana contends, if it may tax oil and gas production under 1891 and 1924 Act leases, it may tax production under 1938 Act leases as well. The district court found this argument persuasive. We do not.

The 1924 Act in its entirety provides as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the

> Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

Ch. 211, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1976)). Montana concedes that the provisions of the Act concerned with the procedure for issuing leases and the duration of leases have been

superseded by the 1938 Act. Moreover, the statutory method for collecting the tax -- disbursement by the Secretary -- seems equally inapplicable to the current leases. Montana argues, however, that the language "Provided, that the production of oil or gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands . . ." is nowhere contradicted by the 1938 Act and is inconsistent with no provision of the later statute. Therefore, Montana insists, Congress's silence in 1938 on the subject of taxation must be interpreted as an implicit incorporation of the taxation portion of the 1924 Act into the 1938 statutory scheme.

Montana's argument is, in essence, an invocation of assorted maxims of

statutory construction. Citing United States v. Greathouse, 166 U.S. 601, 605 (1897), Montana advises us of the rule that where two statutes on the same subject matter are not absolutely irreconcilable, both should be given effect. Montana also draws comfort from the canon that a long held agency interpretation of a statute in which Congress has silently acquiesced is entitled to great deference. See United States v. Rutherford, 442 U.S. 544, 554 (1979). Montana points to informal decisions by the Solicitor of the Interior Department in 1956 and 1966 concluding that the 1924 Act's consent to state taxation applied to 1938 Act leases, and notes that the Department did not overrule these opinions until 1977. See 84 Interior Dec. 905, 911 (1977). In view of Congress's failure to alter the Department's 1956 interpretation, Montana

suggests that the Department behaved improperly in repudiating its earlier view. Therefore, it concludes, this court must defer to the Department's 1956 position.

In invoking what it terms "the applicable rules of statutory construction," by which, it insists, we are bound, Montana fails to appreciate that such rules are merely guideposts in discerning Congressional intent. See Busic v. United States, 446 U.S. 398, 406-07 (1980); United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69 (1976); Gooch v. United States, 297 U.S. 124, 128 (1936); Shields v. United States, 698 F.2d 987, 990 (9th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 73 (1983).

Montana's argument that the 1924 consent must be construed as a blanket

consent to taxation, effective with respect to all mineral leases on unallotted treaty reservation lands unless issued under a statute prohibiting taxation, stretches the canon of construction disfavoring repeals by implication beyond its intended scope. The cases Montana cites that invoke this canon are not apposite. In one case, the canon was invoked to dispose of arguments that a statute addressing one concern repealed an earlier statute addressing another, see Morton v. Mancari, 417 U.S. 535 (1974) (Civil Rights Act did not repeal portion of IRA); in another, to dispose of arguments that an amendment to one part of a statute repealed another part, see Posadas v. National City Bank, 296 U.S. 497 (1936) (amendment to § 25 of Federal Reserve Act did not repeal unamended portion of section). We do not

quarrel with the proposition that it is generally unwise to conclude, in the absence of any evidence, that Congress intended to cause a prior statute to have no future effect. Where Congress has enacted legislation without attention to the provisions of prior Acts, courts should not attribute to Congress the unexpressed purpose of nullifying earlier statutes. This general principle, however, is inapplicable where, as here, all parties concede that Congress intended the later statute to supersede the prior one. In enacting the 1938 Act, Congress manifested an unmistakable intention to subject subsequent leases to the terms of the new statute rather than to its predecessors. The crucial inquiry is whether Congress nonetheless intended that a portion of one of the predecessor

statutes control a lease issued under the 1938 Act.

In ascertaining Congress's intent, we look to the language, legislative history and context of the 1938 Act, and find no manifestation of a purpose to subject leases under the new statutory scheme to the taxes authorized under several of the old statutory schemes. Montana asks that we infer such a purpose from Congress's silence. The Supreme Court has instructed us, however, that congressional consent to state taxation of tribal income from on-reservation activities must be express. See Bryan v. Itasca County, 426 U.S. 373, 393 (1976). We decline to hold that a canon of construction will suffice to supply the deficient express manifestation of

Congress's intent to permit the tax.[21]

Montana also insists that we must interpret the two statutes in accordance with the Interior Department's earlier position. The deference we should accord to administrative interpretations of statutes is not absolute. See Cruz v. Zapata Ocean Resources, Inc., 695 F.2d 428 (9th Cir. 1982). In this case, we note several factors that undermine the authority of the 1956 interpretation. The Interior Department adopted its 1956 position informally, and without any analysis of the question before us -- whether Congress intended the 1924 consent to taxation to apply to leases

21 We note in addition, that commentators have expressed their opinions that the 1924 Act's consent to taxation is inapplicable to 1938 Act leases. See, e.g., F. Cohen, supra note 4, at 409; see also M. Price and R. Clinton, Law and the American Indian 804 (1983).

issued under the 1938 Act. See United States Dept. of the Interior Solicitor's Opinion M-36345 (May 4, 1956) (unpublished). The Interior Department's first articulation of this interpretation was not contemporaneous with the enactment of the 1938 statute, but rather, occurred 12 years later. The Department expressed this interpretaton [sic] only in unpublished memoranda. The inference of Congressional acquiescence Montana would have us draw is undermined where, as here, there is no evidence that the Department's interpretation was brought to Congress's attention. See also Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."). Finally, the Department repudiated its earlier interpretation in 1977, see 84

Interior Dec. 905 (1977), in a published and carefully reasoned opinion that analyzed both statutes and the Department's prior rulings. In 1979, the Department reexamined and adhered to its 1977 position. See 86 Interior Dec. 181 (1979). Under these circumstances, confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage.

We conclude that Montana's collection of maxims is insufficient support for what we view to be an unlikely proposition: that Congress intended that part of one sentence in one of the statutes otherwise totally superseded by the 1938 Act be incorporated into the 1938 Act, and that Congress manifested its intention through silence. There is

nothing in the legislative history or the language of the 1938 Act even hinting that Congress anticipated that the provisions of <u>any</u> of the prior leasing statutes would be applied to leases issued under the 1938 Act.

We note, in addition, that the 1924 Act was an integral part of Congress's allotment program, under which all Indian land was intended to become subject to state taxation after the expiration of a brief trust period. <u>See</u> United States Department of the Interior, <u>supra</u>, at 856-59; <u>supra</u> section I. Congress's consent to the exercise of state taxing authority over Indian Tribes was in harmony with the purposes of allotment. The 1938 Act, however, replaced prior mineral leasing statutes with a scheme calculated to advance the policies of tribal sovereignty and economic growth

reflected in the IRA. We fail to see how interpreting the 1938 Act to incorporate implicitly the portion of the 1924 Act consenting to state taxation would advance purposes of the 1938 Act.[22]

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22 The district court found harmony between the purposes of the IRA and the 1924 consent to taxation on the theory that the IRA sought to enable Indians to enter the economic world on an equal footing and taxation statutes are economic facts of oil and gas production. In identifying this harmonious aspect, the district court disregarded the IRA's express extension of the tax-exempt status of Indian land, <u>see</u> IRA §§ 2, 5, 48 Stat. 984, 984, 985 (codified at 25 U.S.C. §§ 462, 465 (1976)). In 1936, Congress acted to extend the tax exemption to land purchased with Indian trust or restricted funds, and appropriated money to reimburse Indians whose land had been taxed and redeem any land that had been forfeited for failure to pay assessed taxes. Act of June 20, 1936, ch. 622, 49 Stat. 984 (codified as amended at 25 U.S.C. § 421a (1976)). <u>See</u> H. R. Rep. 2398, 74th Cong., 2d Sess. (1936). Congress's commitment to the tax exempt status of restricted land, and its continuing appropriations for Indian education, health care, tribal police and tribal courts, services traditionally provided to state citizens by state

We hold that the 1924 Act's consent to taxation is inapplicable to the 1938 Act and to leases executed pursuant to its authority. Accordingly, we reverse so much of the district court's judgment as upheld the taxation of tribal royalties earned on 1938 Act leases.

IV

Montana argued to the district court that even if Congress had not consented to taxation of tribal proceeds from 1938 Act leases, its taxes were nonetheless valid because the legal incidence of the taxes fell on the non-Indian producer-lessees and not on the tribe. Because the district court concluded that the taxes were valid, it did not reach the

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(Footnote 22 continued) governments from state taxes, demonstrate to us that Congress did not intend for Indians to be treated equally for tax purposes. See, e.g., Appropriations Act of August 9, 1937, ch. 570, 50 Stat. 564, 574-90.

question of the taxes' legal incidence. We therefore remand the case to enable the district court to address this issue. Should the court determine that the legal incidence of the tax falls on the producer-lessees, it should then decide whether Montana's statutes are preempted under the standards articulated in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 230 (1982).

AFFIRMED in part, REVERSED in part and REMANDED.

BLACKFEET TRIBE OF INDIANS v. WILLIAM GROFF, etc.

No. 81-3041

J. BLAINE ANDERSON, Circuit Judge, with whom WALLACE and KENNEDY, Circuit Judges, join, concurring and dissenting:

I concur, but with additional reasons, in the majority's holding that the 1938 Act did not impliedly repeal the 1924 Act. I respectfully dissent, however, from the majority's view that the 1924 Act's taxing authorization is inapplicable to leases entered into after promulgation of the 1938 Act.

My disagreement has three bases. First, the majority misapplies well-established rules of statutory construction by stating that the issue is whether the 1938 Act "expressly incorporated" the 1924 Act's taxing authorization. Majority Opinion at 13. Once

having concluded that the 1924 Act is still in effect, I fail to understand how it can be construed to have no force. Second, there has been a long-standing and consistent interpretation by the Department of Interior of the continued effectiveness of the 1924 Act's taxing authorization. I find this prior consistent interpretation much more indicative of the intended effect of the 1938 Act on the 1924 Act than the Department's reversal of its prior position in 1977. Third, if Congress meant to abrogate the authority of the states to tax the extraction of mineral resources on unallotted land as conferred by the 1924 Act, it surely would have made such an intent clear. It did not and it is not the province of this court to make that judgment for the legislative branch.

The majority opinion concludes that the 1924 Act was not impliedly repealed because the 1938 Act recognized the continued effectiveness of leases entered under the authority of prior acts. I agree with that observation, but I believe as well that other reasons compel such a conclusion.

Section 7 of the 1938 Act contains a "general repealing" clause. It is hornbook law that a general repealer is in "legal contemplation a nullity." 1A C. Sands, Sutherland Statutory Construction, § 23.08 at 221 (4th ed. 1972). In fact, a general repealer has been held to imply "very strongly that there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79 (1885). One must turn therefore to other rules governing the determination whether the 1938 Act

repealed the 1924 Act. Sutherland, supra. As Congress did not expressly repeal the 1924 Act, the question is whether it impliedly did so.

Repeals by implication are strongly disfavored. Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). As stated by the Supreme Court in Posadas:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest....

296 U.S. at 503.

Simply, there is no "irreconcilable conflict" between the provisions of the

1924 and 1938 Acts. There is no doubt the two statutes are capable of coexistence. The 1938 Act uses and expands the oil and gas leasing procedures outlined in the 1924 Act and applies them to all leases. Section 1 of the 1938 Act, 25 U.S.C. § 396a, reiterates much of the language of the 1924 Act regarding tribal council consent, BIA approval, and a general ten-year durational limit on the leases. Section 2 of the 1938 Act, 25 U.S.C. § 396b, expands the 1924's Act public auction requirements. The 1938 Act is silent regarding taxation. The language of the statute does not evince a clear indication that repeal of the taxing authorization was intended. On its face, taxation of mineral production is quite compatible with the 1938 Act.

Nor does the 1938 Act "cover the whole subject" of the 1924 Act, for

although the 1938 Act was an attempt to make uniform the "patch-work state" of the prior leasing laws, F. Cohen, Handbook of Federal Indian Law, 328 (1942 ed.), it is silent on the subject of taxation. It is true that the 1938 Act replaces the 1924 Act's leasing procedures. The taxing provision of the 1924 Act stands on its own, however. As stated in Posadas, an implied repeal will be found only to the extent of the conflict between the prior and latter statutes. 296 U.S. at 503. The 1938 Act does not address taxation and nothing otherwise indicates that taxation conflicts with it.

Last, there has been a long-term interpretation by the Department of Interior that the 1938 Act did not impliedly repeal the 1924 Act, including its taxing authorization. See 84

Interior Dec. 905 (1977) and its references to the prior opinions. Generally, the construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the administrative interpretation. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

Once having concluded that no implied repeal occurred, the majority nonetheless states that the taxing consent does not apply to the 1938 Act because the 1938 Act did not "expressly incorporate" the 1924 Act's taxing authorization. See majority opinion at 13, 17. Such a result plainly contravenes the principle that once having found no implied repeal, it is the court's obligation to read the statutes together and give effect to both. Morton

v. Mancari, 417 U.S. at 551; Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); see Nebraska Public Power District v. 100.95 Acres of Land, 719 F.2d 956 (8th Cir. 1983); Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), cert. denied, ____ U.S. ____, 77 L.Ed.2d 298 (1983). The majority's holding also neglects the related rule that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." Morton, 417 U.S. at 550-551. The 1938 Act is a general leasing statute and the specific taxing provision of the 1924 Act should be read into it, rather than nullified. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

By implication, the majority relies on the Tribe's argument that this court

should follow the canon of construction which provides that ambiguities in statutes are to be resolved in favor of the Indian tribes. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). The taxing authorization in the 1924 Act is, however, unambiguous. This "canon of construction is not a license to disregard clear expressions of . . . congressional intent." DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); accord, Andrus v. Glover, 446 U.S. 608, 619 (1980). Nor does the 1938 Act create any ambiguity. It is silent on the repeal of the 1924 Act. Use of this canon of construction would require the court to amend the 1938 Act to expressly limit the 1924 Act. That, however, goes beyond a liberal interpretation of an ambiguous clause or phrase and entails legislating by the judicial branch. This

we may not do. Shields v. United States, 698 F.2d 987, 990 (9th Cir.), cert. denied, ____ U.S. ____ , 78 L.Ed.2d 86 (1983); see Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Supreme Court was faced with a similar situation. In that case the Court upheld Montana's right to tax oil and gas production on the Blackfeet Reservation pursuant to the 1924 Act. The non-Indian oil producer argued that two other statutes, the Act of June 30, 1919, 41 Stat. 3, 16, 17, and the Act of September 20, 1922, 42 Stat. 857, specifically governed the leasing of minerals on the Blackfeet Reservation. These provisions were silent on the subject of state taxation and, it was argued, the

1924 Act therefore did not apply. The Court, however, read all the acts together as one law and approved state taxation under the 1924 Act. 299 U.S. at 166. This court should do the same. While the 1938 Act replaced the 1924 Act's leasing provisions, the taxing authorization was left intact and must be read as effective along with the 1938 Act. _See Yellowfish_, 691 F.2d at 930.

The question is not whether the 1938 Act "expressly incorporated" the 1924 Act, but whether the 1924 Act's taxing authorization applies under its own terms to leases entered into under the 1938 Act. The language of the 1924 Act and the construction of it by the Supreme Court show that it is applicable. By its plain language, the 1924 Act applies to "unallotted land on Indian reservations other than the lands of the Five

Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to Section 3 of the Act of February 28, 1891. . . ." The Act then provides that "the production of oil and gas and other minerals _on such lands_ may be taxed by the state. . . ." (Emphasis added). "Such lands" clearly aplies [sic] to unallotted lands subject to lease under the 1891 Act. Lands subject to lease under the 1891 Act are those "lands occupied . . . by Indians who have bought and paid for the same, and which lands are not needed for farm or agricultural purposes. . . ." In _British-American Oil_, the Supreme Court construed this language to include not only "lands acquired by Indians through the payment of a consideration in money, but equally

including lands reserved for Indians in return for cession or surrender by them of other lands, possessions or rights." 299 U.S. at 164. The Court relied on Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P. 348 (1896), and uniform administrative practice to support its construction of "bought and paid for":

> It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, holds said lands as purchasers having paid for the same, in the sense in which the words "have paid for the same" are used in the Act of 1891.

Opinion of the Assistant Attorney General, cited in 25 Land Dec. 408, 412 (1897); see Strawberry Cattle Co., 45 P. at 350-351.

The Tribe argued, and the majority impliedly accepts, that the use of the term "such lands" in the 1924 Act should limit the tax authorization to leases made pursuant to the 1891 or 1924 Acts. We think the plain meaning of the 1924 Act cannot be so narrowly constricted. The term "such lands" addresses generally the property which may be leased. It does not refer only to those leases in which the 1891 or 1924 Acts are cited as authority. In British-American Oil, the Supreme Court concluded that the 1924 Act authorized taxation of oil and gas leasing on the Blackfeet Reservation. In addition, Felix Cohen construed the 1924 Act as applying to unallotted reservation land. Handbook of Federal Indian Law, supra, at 257. The 1938 Act leases at issue here involve unallotted land. The language of the 1924 Act's taxing

authorization is broad, and it plainly applies.[1]

I also disagree with the majority's rejection of the long and consistent Department of Interior interpretation that the 1938 Act did not affect the right of the states to tax. First, from 1938 to 1956 the Department of Interior acquiesced in state taxation of mineral production, notwithstanding the existence of the 1938 Act. Since Interior sponsored the 1938 Act, it certainly could have put an end to state taxation of mineral extraction if it intended the 1938 Act to have that effect. Then, in 1956, the Solicitor for the Department of

1 Mr. Cohen also made no mention of any loss of effectiveness of the 1924 Act's authority for state taxation due to the 1938 Act. At the time of the 1942 publication of his Handbook, Mr. Cohen was an assistant Solicitor in the Department of Interior. Mr. Cohen, who

Interior explicitly found that the 1938 Act did not affect the 1924 Act's taxing authorization. In 1966, the Solicitor affirmed this position. It was not until 1977 that the Department reversed its position. 84 Interior Dec. 905. The majority follows that later decision in holding that taxation is permitted only for leases entered under the authority of the 1924 and 1891 Acts. This later interpretation, however, overturned a long-standing and consistent administrative construction of the law, and is not entitled to any substantial deference. Watt v. Alaska, 451 U.S. 259, 272-273

(Footnote 1 continued) died in 1953, was also this country's preeminent authority on Indian law. Presumably, he was well aware of the intent underlying the 1938 Act and surely he would have been aware of any loss of effectiveness of the 1924 Act due to the operation of the 1938 Act. Perhaps that is why the Department of Interior consistently upheld state taxation of mineral resources until 1977.

(1981); Red Lion Broadcasting Co., 395 U.S. at 381.

Instead, this court should rely on the Department's prior consistent interpretation of the 1924 and 1938 Acts. It is true, as the majority states, that the prior announcements of the Department were not contemporaneous with the passage of the 1938 Act. Also, they were informal opinions. Nonetheless, they are still entitled to deference from the courts. See Rice v. Rehner, ___ U.S. ___, 77 L.Ed.2d 961, 976-977 & n.13 (1983); Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th Cir.1967), cert. denied, 389 U.S. 1046 (1968). Moreover, they most likely were the result of what the Department thought was plainly the law, i.e., the 1938 Act had no effect on the power of the states to tax mineral resource extraction on

unallotted land because it did not expressly repeal the 1924 Act.

If Congress had intended to limit the taxing authorization of the 1924 Act, it would have done so expressly. Surely, there would have been at least some protest from the representatives of the western states, to which the taxation of mineral resources is so important, if the 1938 Act was intended to have such effect. No such protest can be found in the history of the passage of the 1938 Act.

For the preceding reasons, I would affirm the district court.[2]

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2 The Act of March 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. §§ 398a-e, permits the state taxation of mineral resource extraction on unallotted executive order reservation land. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The majority fails to point out that its holding would have a like effect on the continued effectiveness of the 1927 Act, which was modeled largely on the 1924 Act.

APPENDIX B

THE BLACKFEET TRIBE OF INDIANS,

Plaintiff-Appellant,

v.

WILLIAM A. GROFF, Director,
Montana Department of Revenue,
STATE OF MONTANA;
GLACIER COUNTY, Montana; and
PONDERA COUNTY, Montana,

Defendants-Appellees.

No. 81-3041

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

On Appeal from the United States
District Court for the
District of Montana
The Honorable Paul G. Hatfield,
District Judge, Presiding
Argued and submitted February 3, 1982
Decided Dec. 14, 1982

Before: SNEED, ANDERSON, and REINHARDT, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The Blackfeet Tribe of Indians (the "Tribe") filed suit seeking equitable relief against state taxation of oil and

gas production undertaken by the Tribe's non-Indian lessees on the Blackfeet Reservation. Named as defendants were William Groff as Director of the Montana Department of Revenue, the State of Montana, Glacier County, Montana, and Pondera County, Montana (all simply the "State"). The district court, the Honorable Paul G. Hatfield presiding, granted the State's motion for summary judgment.[1] We affirm.

I. BACKGROUND

The Blackfeet Tribe, under the supervision of the Department of the Interior, is the lessor of 125 parcels of tribal land for oil and gas mining

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1 The district court opinion is reported at 507 F.supp. 446 (D. Mont. 1981.)

purposes. The Tribe is the beneficial owner of the mineral rights in issue. The United States holds the legal title in trust for the Tribe. The lessees (or "producers") are not Indian or Indian-owned entities. The Tribe receives royalty payments based on the amount of oil and gas produced. Oil and gas leasing on the reservation began in 1932 and has continued until the recent past.

Four Montana taxing statutes are at issue.[2] One has been in force at all

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2 The Montana taxing statutes are:

(1) The Oil and Gas Conservation Tax, § 82-11-131, M.C.A. (formerly § 60-145, R.C.M. 1947);

(2) The Resource Indemnity Trust Tax, § 15-38-104, M.C.A. (formerly § 84-7006, R.C.M. 1947);

times relevant to this action. Two were enacted in the 1970's and the other in 1953. All four statutes tax different aspects of the production of the oil and gas extracted by the non-Indian lessees. The Tribe admits it has not paid any of these taxes directly to the State; the producers have paid the taxes. The Tribe asserts, however, that the producers have deducted the Tribe's share of taxes from the royalty payments.

(Footnote 2 continued)

(3) The Oil and Gas Severance Tax, § 15-36-101, M.C.A.

(4) The Oil and Gas Net Proceeds Tax, § 15-23-601, <u>et seq</u>., M.C.A. (formerly § 84-7201, <u>et seq</u>., R.C.M. 1947).

The Tribe brought this action in 1978. Both the Tribe and the State moved for summary judgment. The district court granted summary judgment in favor of the State.

II. DISCUSSION

District Judge Hatfield based his grant of summary judgment on the belief the 1924 Act authorized state taxation of reservation oil and gas production; because the 1924 Act authorized the taxes at issue, it was unnecessary to reach the issue of whether the legal incidence of the tax is on the Tribe. The Tribe argues on appeal that the 1924 Act is no longer in effect and the incidence of the tax adversely impacts its inherent right of sovereignty. As this appeal is from a summary judgment, our review is the same as that of the trial court. National Industries, Inc. v. Republic National

Life Ins. Co., 677 F.2d 1258, 1265 (9th Cir. 1982). Few, if any, facts are in dispute. Virtually all issues are legal and involve the often difficult questions of jurisdiction in Indian Country.

A. Congressional Authorization to Tax.

A state's power to tax transactions arising in Indian Country is severely limited. This is especially true when Indian interests are affected. Thus, it was early established that the states could not tax Indian trust property. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867). More recently, it has been held that the states may not tax the income earned by tribal members on the tribe's reservation, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d, 129, 93 S.Ct. 1257 (1973), the personal property of tribal members, Bryan v.

Itasca County, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976), or sales involving tribal members, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976), and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

State jurisdiction over the affairs of non-Indians in Indian Country often presents more difficult issues. Such jurisdiction must usually be analyzed in terms of federal preemption and/or the Tribe's limited right of sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 65 L.Ed.2d 665, 672, 100 S.Ct. 2578 (1980). If the state taxation of non-Indians in Indian Country is not preempted, Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685,

14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), it may be upheld if the state's interest in taxing the non-Indians is substantial and outweighs the sovereignty interest of the tribe. See Confederated Colville Tribes, supra, 447 U.S. 134, 65 L.Ed.2d 10.

The major exception to the limited power of the states to tax Indian or non-Indian interests in Indian Country is when there is an express authorization by Congress for the tax. See Bryan v. Itasca Country, supra, 426 U.S. 373, 48 L.Ed.2d 710, and McClanahan v. Arizona State Tax Commission, supra, 411 U.S. 164, 36 L.Ed.2d 129. The district judge found, and the State argues, such authorization exists. Our task, then, is to determine whether Congress has evinced its consent to the taxes at issue.

We have little difficulty finding such consent in the Act of May 29, 1924,

43 Stat. 244 (the "1924 Act"). This statute, currently codified at 25 U.S.C. § 398, amended the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397.[3]

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3 The 1891 Act provides:

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: Provided, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may

The 1891 Act authorized the leasing of

(Footnote 3 continued) recommend, subject to the approval of the Secretary of the Interior.

The 1924 Act states in full:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are

tribal property for grazing and mining purposes, within certain specified regulations. The 1924 Act includes a specific procedure for oil and gas leasing and provides in part:

> That the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands. . . .

The 1924 Act's authorization of state taxation of oil and gas production and

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(Footnote 3 continued) located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

net proceeds under tribal leases on the Blackfeet Reservation was upheld in British-American Oil Prod. Co. v. Board of Equalization of Montana, 299 U.S. 159, 81 L.Ed. 95, 57 S.Ct. 132 (1936).

B. Effect of the Act of 1938

The Tribe contends the 1924 Act's tax authorization was abrogated by the Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g (the "1938 Act").[4] The 1938 Act did not

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4 The 1938 Act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such

(Footnote 4 continued) Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil-and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe. Such advertisements shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

(Footnote 4 continued) SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such lands or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

expressly repeal the 1924 Act.[5] While we recognize the 1938 Act was an attempt to provide uniformity in an area which has been described as a "patch-work

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(Footnote 4 continued) SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act or parts of Acts inconsistent herewith are hereby repealed.

5 The 1938 Act contains a general repealer. See Section 7 of the 1938 Act reproduced in footnote 4. Generally, the presence of a general repealer is not considered a strong indication that all prior law on the subject is meant to be repealed. 1A Sutherland Statutory Construction § 23.08 (4th Ed. 1972). In fact, a general repealer has been construed to imply "very strongly that

state," F. Cohen, Handbook of Federal Indian Law, 328 (1942 Ed.), we cannot agree with the Tribe that this act impliedly repealed the 1924 Act's tax authorization.[6]

(Footnote 5 continued) there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79, 28 L.Ed. 927, 929, 5 S.Ct. 377 (1885); Sutherland, supra, § 23.08.

6 But cf. Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (1982), cert. denied, 51 U.S.L.W. 3281 (10/12/82). In Crow Tribe, this court held the Tribe had stated a cause of action in its suit to enjoin state taxation of the Tribe's non-Indian lessees of coal rights. In so holding, the court stated in dictum the 1938 Act "probably" repealed the prior leasing statutes, apparently including the 1924 Act and its tax authorization. 650 F.2d at 1112, fn. 10. For two reasons, we refuse to follow that conclusion. First, the 1924 Act's tax authorization applies only to oil and gas leasing, not coal, so this issue was not before the court. Second, Crow Tribe is a pleading case and any statements beyond those necessary to sustain upholding the Tribe's statement of a cause of action are dicta.

At the outset, we note the opinion in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982), while not dispositive, offers support for our conclusion the 1938 Act did not repeal the 1924 Act. In Merrion, the Court upheld the right of the Jicarilla Apache Tribe to tax oil and gas production on its reservation. New Mexico had in existence its own oil and gas production taxes pursuant to the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-e. The 1927 Act's main purpose was to extend the 1924 Act's coverage to executive order reservations. See, F. Cohen, Handbook of Federal Indian Law, 534 (1982 Ed.) The Court noted in Merrion that it was not deciding the issue whether the state could tax oil and gas production through leases entered under the 1938 Act. 455 U.S. at ___, 71

L.Ed.2d at 38, fn. 17. Nonetheless, the Court treated the 1927 and 1938 Acts as a composite whole and made no indication the state lacked the authority to tax. We believe a similar analysis should apply to the 1924 and 1938 Acts.

The 1938 Act attempts to make uniform the law governing the leasing of tribal (unallotted) lands for mineral purposes. Letter from Charles West, Acting Secretary of the Interior, to the House Committee on Indian Affairs, June 17, 1937, reprinted in H. R. Rep. No. 1872, 75th Cong., 3d Sess. (1938); S. Rep. No. 985, 75th Cong., 1st Sess. (1937). It does so by regulating the leasing of all minerals, not solely certain types of mineral leasing. 25 U.S.C. § 396a. It also regulates the procedures for entering a lease and allows the Department of Interior to

issue rules to that effect. 25 U.S.C. § 396d. The legislative history also makes it clear the 1938 Act was designed to further the purposes of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479. Letter from Charles West, _supra_. The Reorganization Act was quite clearly an effort to reverse the assimilation policies of the Allotment Acts and to encourage Indian self-government. _See_ _Fisher_ _v._ _District_ _Court_, _etc_., 424 U.S. 382, 387, 47 L.Ed.2d 106, 111 96 S.Ct. 943 (1976). The 1938 Act furthers these goals by giving tribes more control over the decisions to lease and by streamlining the leasing process to secure a higher economic return to the tribes.

Against the policy and scope of the 1938 Act, we must balance the long-recognized rule that repeals by

implication are strongly disfavored. _Morton_ _v._ _Mancari_, 417 U.S. 535, 549, 41 L.Ed.2d 290, 300, 94 S.Ct. 2474 (1974); _Posadas_ _v._ _National_ _City_ _Bank_, 296 U.S. 497, 503, 80 L.Ed. 351, 355, 56 S.Ct. 349 (1936). As explained by the Supreme Court in _Posadas_:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. _But in either case, the intention of the legislature to repeal must be clear and manifest_. . . .

296 U.S. at 503, 80 L.Ed. at 355 (Emphasis added).

We see no "irreconcilable conflicts" in the language of the 1924 Act and the 1938 Act. There is no doubt the

two statutes are capable of coexistence. The 1938 Act primarily uses and expands the oil and gas leasing procedures outlined in the 1924 Act and applies them to all leases. Section 1 of of [sic] the 1938 Act, 25 U.S.C. § 396a, reiterates much of the language of the 1924 Act regarding tribal council consent, BIA approval, and a general ten-year durational limit on the leases. Section 2 of the 1938 Act, 25 U.S.C. § 396b, expands on the 1924 Act's public auction requirements. The 1938 Act is silent regarding taxation. The language of the statute does not evince a clear indication that repeal of the taxing authorization was intended. On its face, taxation of oil and gas production is quite compatible with the 1938 Act.

Nor does the legislative history supply the necessary showing of intent.

It is true, as the Tribe argues and we have noted, the 1938 Act was an effort to make uniform the leasing laws and to bring them into harmony with the policies of the Indian Reorganization Act. The terms of the 1938 Act make it evident, however, it was the intent of Congress to supply uniformity by placing the leasing of mineral rights other than oil and gas within a statutory framework similar to that provided for in the 1924 Act. See Letter from Charles West, supra. Also, to bring leasing into harmony with the Reorganization Act, the drafters of the 1938 Act attempted to create a system which would provide the tribes with the "greatest return on their property." Id. Apparently, the drafters of the bill believed the new act would streamline the leasing process and thereby increase the availability of

leases for all types of minerals.[7] The streamlined process, however, was substantially derived from the 1924 Act. Neither the language of the statute nor the legislative history persuades us that there is an irreconcilable conflict or repugnancy between the 1924 and 1938 Acts.

The only possible conflict between the 1924 and the 1938 Acts involves the Reorganization Act's self-determination and self-sufficiency policies.

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7 In addition to being in a "patch-work state," some leasing statutes mandated following the general mineral leasing laws used on public domain lands. This procedure created "long delay and quite an expense to an applicant for a lease." Letter from Charles West, <u>supra</u>.

Arguably, these policies conflict with the continued authorization of state taxation which might tend to reduce tribal income. This possible conflict, however, must be viewed in light of another Reorganization Act policy which was the desire to encourage tribes "to enter the white world on a footing of equal competition." Statements of Rep. Howard, 78 Cong. Rec. 11732, <u>quoted in</u> <u>Mescalero Apache Tribe v. Jones</u>, 411 U.S. 145, 152, 36 L.Ed.2d 114, 121, 93 S.Ct. 1267 (1973); <u>see also</u> <u>Fort Mojave Tribe v. San Bernadino</u> [sic] <u>County</u>, 543 F.2d 1253, 1256 (9th Cir. 1976), <u>cert. denied</u>, 430 U.S. 983, 52 L.Ed.2d 377, 97 S.Ct. 1678 (1977). State taxation is one of the realities of an equal footing. We do not believe this possible policy conflict rises to the

level of irreconcilability required to constitute an implicit repeal.[8]

Even though the 1938 Act is a more comprehensive and general statute than the 1924 Act, a fact which sometimes will lead to a finding of an implied repeal of the earlier act; <u>Posadas</u>, <u>supra</u>, 296 U.S. at 503, 80 L.Ed. at 355, we still do not find there to be the requisite conflict. This conclusion is supported by the rule that "[w]here there is no clear intention

8 We believe this arguable policy conflict in the 1938 and 1924 Acts is found primarily through the benefit of hindsight. While the intent of the 1938 Act makes clear the belief the tribes would be able to secure revenue through mineral leasing, we doubt Congress or the Department of Interior had any idea mineral resources on reservations would rise to the level of importance they have today. It is the current import of those resources which makes taxation such a critical issue at present. In our analysis of the 1938 Act, however, our <u>primary</u> emphasis must focus on the intent of Congress at that time, not on the present.

otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." <u>Morton</u>, <u>supra</u>, 417 U.S. at 550-551, 41 L.Ed.2d at 301.

The Tribe argues the canon of construction which provides that ambiguities in statutes are to be resolved in favor of the Indians applies to this case. <u>See</u>, <u>e.g.</u>, <u>Bryan v. Itasca County</u>, <u>supra</u>, 426 U.S. at 392, 48 L.Ed.2d at 723. We cannot agree. The 1924 Act's tax authorization is unambiguous. This "canon of construction is not a license to disregard clear expressions of . . . congressional intent." <u>DeCoteau v. District County Court</u>, 420 U.S. 425, 447, 43 L.Ed. 300, 315, 95 S.Ct. 1082 (1975); <u>Andrus v. Glover</u>, 446 U.S. 608, 619, 64 L.Ed.2d 548, 558, 100 S.Ct. 1905 (1980). Nor

does the 1938 Act create any ambiguity. It is silent on the repeal of the 1924 Act. The Tribe's use of this canon of construction would have us amend the 1938 Act to include an express repeal of the 1924 Act. That, however, would be going beyond a liberal interpretation of an ambiguous clause or phrase to the point of judicial legislating. This we will not do. See Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011, 54 L.Ed.2d 754, 98 S.Ct. 722 (1978).

Additionally and perhaps most importantly, there has been a long-term administrative interpretation upholding the right of states to tax oil and gas production on the reservations notwithstanding the silence of the 1938 Act. This, outside compelling reasons otherwise, is sufficient to support the

continued validity of the 1924 Act. See Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th Cir. 1967), cert. denied, 389 U.S. 1046, 19 L.Ed.2d 838 (1968); Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978); Castillo-Felix v. Immigration and Naturalization Service, 601 F.2d 459, 465 (9th Cir. 1979). Beginning in 1943, the Department of Interior interpreted the 1924 Act to be of continued effectiveness despite the 1938 Act. Several supporting interpretations were made until a contrary interpretation was issued in 1977. See 84 Interior Dec. 905 (1977) and its references to the prior opinions. Generally, the construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the

administrative interpretation. _Red Lion Broadcasting Co. v. F.C.C._, 395 U.S. 367, 381, 23 L.Ed.2d 371, 384, 89 S.Ct 1794 (1969). The contrary interpretation by the Solicitor of the Department of Interior in 1977 does not change the result in this case. Unless the original interpretation of the statute by the Department was clearly wrong, which we do not believe to be true, it is not appropriate for the Department to reverse its long held construction of a statute. _See United States v. Leslie Salt Co._, 350 U.S. 383, 396, 100 L.Ed. 441, 451, 76 S.Ct. 416 (1956); _Power Brake Equipment Company v. United States_, 427 F.2d 163, 164 (9th Cir. 1970); _Red Lion_, _supra_, 395 U.S. at 381, 23 L.Ed.2d at 384. Furthermore, the presumption against repeal by implication, the long

and consistent interpretation by the Department of Interior, and congressional acquiescence in that interpretation all lead to the conclusion the 1977 opinion is erroneous.

We hold, then, that the 1924 Act and its authorization to tax reservation oil and gas production was not implicitly repealed by the 1938 Act.

C. _Leases Under the 1938 Act_

The Tribe contends that even if the 1924 Act is not found to be repealed by the 1938 Act, 113 of the leases in question were entered pursuant to the 1938 Act; therefore, the 1938 Act controls and it does not contain an authorization to tax. For the following reasons, we reject this argument.

Most, if not all, of what has been said concerning the implied repeal of the 1924 Act applies with equal force to the

Tribe's contention. Having found the 1924 Act to still be in force, we would be remiss to find it lacked any effect. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton, supra, 417 U.S. at 552, 41 L.Ed.2d at 301; Radzanower v. Touche Ross & Co., 426 U.S. 148, 48 L.Ed.2d 540, 96 S.Ct. 1989 (1976).

Furthermore, the fact the leases were made pursuant to the 1938 Act does not affect the State's power to tax. The critical aspect is the State's authorization to tax, not the statute under which the leases were made. In any event, both statutes purport to regulate leasing on the same lands--unallotted

reservation property.[9] It is not a strain on our reasoning to find the two acts have a concurrent, cumulative, and compatible effect. We hold, therefore, the 1924 Act's taxing authorization applies with equal force to leases made pursuant to the 1938 Act.

III. CONCLUSION

We find the 1924 Act to permit Montana to tax oil and gas production on the Blackfeet Reservation. The 1938 Act did not impliedly repeal the 1924 Act and its authorization for the taxes at issue.

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9 While the 1924 Act, through its predecessor the 1891 Act, does not use the same language to describe the lands to which it applies as the 1938 Act, the 1924 Act has been construed to have had the same coverage as the 1938 Act. British-American Oil Prod. Co., supra, 299 U.S. at 164.

The decision of the district court is AFFIRMED.[10]

10 Judge Reinhardt concurs in the result, but was unable to participate in the preparation or approval of this Opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

THE BLACKFEET TRIBE OF INDIANS,

Plaintiff,

vs.

STATE OF MONTANA, et al.,

Defendants.

NO. CV-78-61-GF

M E M O R A N D U M

[Filed Jan. 6, 1981.]

In this action the Blackfeet Tribe of Indians challenge five Montana taxation statutes. The Tribe seeks declaratory relief, with injunctive enforcement, from the state's statutes. These statutes authorize the state or county to levy and collect taxes from oil

and gas production. The parties have filed cross motions for summary judgment, filed appropriate memoranda and the matter is ripe for disposition. Jurisdiction is invoked pursuant to 28 U.S.C. §1362, 28 U.S.C. §§2201 and 2202. For the reasons stated below the taxes challenged herein are valid. There being no genuine issue as to any material fact, summary judgment shall be entered in favor of defendants.

FACTS

Plaintiff, the Blackfeet Indian Tribe (hereinafter the "Tribe"), is a tribe of American Indians duly organized pursuant to the Indian Reorganization Act, 25 U.S.C. §461, _et seq_. The Tribe is the beneficial owner of oil and gas which lies beneath its reservation in Montana. Title to the oil and gas is held by the United States in trust for

the Tribe. Certain oil and gas leases have been executed between the Tribe and various non-Indians allowing for the production of oil and gas on the Blackfeet Indian Reservation. Under the facts alleged here the lessor is the Tribe and the lessee is a non-Indian oil and gas producing entity.

The defendants in this action, the State of Montana and the counties of Glacier and Pondera, impose, levy and collect various taxes on the production of oil and gas within the State of Montana in a non-discriminatory manner pursuant to various Montana statutes.[1]

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1 The following are the Montana statutes challenged:

1. The Oil and Gas Conservation Tax, §82-11-131, M.C.A. (formerly §60-145, R.C.M. 1947);

The Blackfeet Tribe has entered into many oil and gas production leases with non-Indian lessees. Since neither the Tribe nor any single member of the Tribe produces any of the oil and gas, they receive a royalty fee from the non-Indian lessee. It is agreed that any and all taxes collected by the state defendants from the production of oil and gas within

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(Footnote 1 continued)

2. The Resource Indemnity Trust Tax, §15-38-104, M.C.A. (formerly §84-7006, R.C.M. 1947);

3. The Producers License Tax, §84-2202, R.C.M. 1947, repealed July 1, 1975 and replaced by the Oil and Gas Severance Tax on July 1, 1975;

4. The Oil and Gas Severance Tax, §15-36-101, M.C.A.

5. The Oil and Gas Net Proceeds Tax, §15-23-601, *et seq.*, M.C.A. (formerly §84-7201, *et seq.*, R.C.M. 1947).

the Blackfeet Indian Reservation have been paid to the state by non-Indian lessees engaged in the business of producing oil and gas. There have been no liens or encumbrances placed on any tribal property as a result of the taxation statutes. The Montana statutes also provide that in the absence of lease provisions to the contrary, the producer may reduce the royalty fee by a prorata share of the cost of the tax. *See* §15-38-104, M.C.A. (Resource Indemnity Trust Tax); §15-36-101(4), M.C.A. (Oil and Gas Severance Tax); §15-23-607(3), M.C.A. (Oil and Gas Net Proceeds Tax).

Without determining whether the legal incidence of these taxes fall upon the non-Indian lessee or the Tribe as lessor of the property, it is possible for the legal incidence of the tax sought to be imposed to fall on the Indians.

However, that legal determination need not be made for the purposes of this summary judgment ruling. See Footnote 2, infra.

With the foregoing as a factual background, a review of the applicable federal law is in order.

FEDERAL STATUTES

By an act of Congress dated February 28, 1891, hereinafter the "1891 Act", found in 25 U.S.C. §397, the federal government authorized mineral leases of Indian land under such terms and conditions as the Tribe might recommend, subject to the approval of the Secretary of Interior. By an act dated May 29, 1924 (now codified 25 U.S.C. §398), hereinafter the "1924 Act", Congress authorized mineral leases for oil and gas and authorized states to tax the production of the same so long as no

lien or charge of any kind or character could encumber the land of the Indian owner. The statute provides in full:

> Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under §3 of the Act of February 28, 1891 (25 U.S.C.S. §397), may be leased at public auction by the Secretary of the Interior, with the consent of the Council speaking for such Indians for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil or gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interest on said lands: provided, however, that such tax shall not become a lien or

> charge of any kind or character against the land or the property of the Indian owner. (emphasis supplied)

Because of what in effect amounted to a patch-work state of the law governing mineral leases on tribal land, see, HANDBOOK OF FEDERAL INDIAN LAW, Felix S. Cohen, p.328 (1942), Congress enacted comprehensive legislation governing the leasing of tribal lands for mining purposes. An act dated May 11, 1938, hereinafter the "1938 Act", now found in 25 U.S.C. §§396(a) thru 396(f), was passed which imposed various procedural standards for leasing unallotted Indian lands for mining purposes. That mining act provided in pertinent part:

> §396(a)...Unallotted lands within any Indian reservation ...may, with the approval of the Secretary of Interior, be leased for mining purposes, by authority of the Tribal Council..., for terms not to

> exceed ten years and as long thereafter as minerals are produced in paying quantities.

§396(b) provided in pertinent part

> ...Leases for oil -- and/or gas mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe....

§396(c) provided

> ...Lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of Interior, guaranteeing compliance with the terms of their leases: . . .

§396(d) provided

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of Interior....

§396(e) provided

> The Secretary of Interior may, in his discretion, authorize superintendents or other officials in the Indian service to approve leases for oil, gas, or other mining purposes covering any restricted Indian land, tribal or allotted.

§396(f) dealt with exceptions concerning certain Indian reservations not of relevance here. The 1938 Act also included a general repealing clause that all acts or parts of the acts inconsistent herewith are hereby repealed. See, §7 of the Act of May 11, 1938.

ANALYSIS

Plaintiff's argument essentially asserts that the Blackfeet Tribe has an inherent right to be free from taxation by the State of Montana and two of its counties. The United States Supreme Court has on occasion ruled that the

state general taxing powers cannot be thrust upon the Indians, the Tribes or their property absent congressional authorization. See, Bryan v. Itasca County, 426 U.S. 373 (1976); Confederated Salish and Kootenai Tribes v. Moe of the Flathead Reservation, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comme., 411 U.S. 164 (1973); British-American Oil Producing Company v. Board of Equalization of Montana, 299 U.S. 159 (1936). Historically, Indians have been found to be exempt from taxes on Indian ownership and activity confined to the reservation. However, those same U. S. Supreme Court opinions have consistently recognized that Indian sovereignty in this regard is dependent upon congressional preservation. See also, U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

Congress may at anytime authorize the state to tax Indian property or activities so long as any state tax authorized by Congress is a non-discriminatory exercise of state sovereign authority. Thus absent discriminatory state action which is prohibited by the Indian commerce clause, the question is only one of congressional intent. Either Congress intended to allow the state to exert its taxing authority or it did not. With the traditional assumption of Indian sovereignty as a backdrop, a review of the relevant statutes is necessary to determine whether this historical immunity has been altered by Congress.

A plain reading of the 1924 Act clearly authorized state taxation of production of oil and gas and other minerals. The Act states in part:

> ...provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of Interior is authorized and directed to be paid the tax so assessed against the royalty interests on said lands: . . .

Therefore, absent an express or an implied repeal Congress has clearly expressed an intent to allow the state to impose their inherent taxing power.

A review of subsequent congressional legislation reveals no federal statute expressly showing a departure from the view that the states have the power to tax oil and gas extraction. The Tribe agrees with this but argues that the 1924 Act has been impliedly repealed by the 1938 Act dealing with the leasing of unallotted Indian lands for mining purposes.

A cardinal rule of statutory construction is that repeals by implication are not favored. Morton v. Mancari, 417 U.S. 535 (1974); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). Furthermore, the principle that repeals by implication are not favored carries special weight when the court is urged to find that a specific statute has been repealed by a more general one. U.S. v. United Continental Tuna Corp., 525 U.S. 164 (1976); see, also, Bradley v. Kissinger, 418 F.Supp. 64 (D.C. 1976).

Repeal by implication is possible when there is a positive repugnancy between two statutes or where the legislature's intent to repeal is clear and manifest. Wilderness Society v. Morton, 479 F.2d 842 (C.A.D.C. 1973), cert. denied, 411 U.S. 917 (197) [sic]; Accord, Southwestern Financial Corp. v.

Smith, 379 F.Supp. 649, rev'd on other grounds, 542 F.2d 278 (19) [sic]; U.S. v. Pacelli, 491 F.2d 1108 (C.A.N.Y. 1974), cert. denied, 419 U.S. 826 (19) [sic]. Thus if provisions in two separate acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of an earlier act. In addition, if a latter act covers the whole subject of an earlier act and is clearly intended as a substitute, the latter act acts as a repeal of the earlier act, but, in either of these situations the intention of the legislature to repeal must be clear; otherwise the rule of construction is that a latter act is to be construed as a continuation of and not a substitute for the first act. Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971).

The Tribe's major argument for repeal is that the 1938 legislation was intended as a "comprehensive law covering mineral leases on unallotted land." See, F. S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, p.328 (Government Printing Office 1940 ed.).

The 1938 Act, as a comprehensive revision of the existing law, addressed nearly every subject concerning the leasing of Indian lands for mining purposes including oil and gas development. See, 25 U.S.C. §§396(a) thru 396(f). The statute, however, did not address the issue of state taxation of mineral production, nor can any legislative history be found concerning the same. The Tribe argues that because permission to tax was part of the existing mineral leasing law and the new statute was designed to be comprehensive

in nature, Congress impliedly intended to repeal the state's permission to tax. This court disagrees with this line of reasoning.

In the first place, if, as the Tribe contends, Congress chose to completely revise the existing mineral leasing law on tribal lands it could have easily changed the existing tax authorization section. Moreover, the Tribe is unable to point to anything in the legislative history of the 1938 Act which can support this repeal by implication. Nor is there anything irreconcilable between the 1924 Act and the alleged repealing Act of 1938. A much stronger congressional intent than the enactment of a comprehensive leasing act must be made to repeal an earlier act dealing with the same subject which authorizes state

taxation of gas and oil production on tribal lands.

The line of authority for statutory construction is further buttressed by principles of law dealing with uniform administrative practice. Since the passage of the 1938 Act until a November, 1977 legal memorandum from the Assistant Secretary for Indian Affairs, the Department of the Interior has consistently viewed with approval the states' taxing power over production of oil and gas on tribal lands leased by the Tribes. Thus for nearly 40 years the agency charged with interpretation of a congressional statute and the individuals charged with the responsibility of its operation have not disputed the states' taxing authority.

The Tribe has placed great reliance on the memorandum dated November 7, 1977,

in which a Solicitor for the Department of Interior concluded that the 1924 state tax authorization act was impliedly repealed by the 1938 comprehensive leasing act. However, within this memorandum itself, the Solicitor states that there had been at least four opinions written by previous solicitors which upheld and acknowledged the power of the state to tax production of oil and gas from tribal leases. The first such opinion by a Solicitor was issued in 1943 and the latest opinion reaffirming the conclusion was in 1966. Inspite of these departmental interpretations, in 1977 a Solicitor issues an opinion which concludes that the previous Solicitor opinions were legally erroneous. This lone opinion then became the foundation by which this litigation attempts to

reverse approximately 40 years of administrative practice.

The persuasiveness of an administrative interpretation of a statute depends upon the thoroughness evident in its consideration, the validity of its reasoning and its consistency with earlier and later pronouncements by the same agency. See, Paden v. U.S. Dept. of Labor, 562 F.2d 470 (7th Cir. 1977). Here, by this 1977 opinion, the Solicitor wishes to reverse what had been approximately 40 years of consistent administrative interpretation. To do so would require compelling indications that prior construction of a statute with those charged with its execution was clearly erroneous. This is especially true when Congress has refused to alter the administrative construction.

See, U.S. v. Radio Television Directors Ass'n., 395 U.S. 367 (1969).

It has been held that where administrative practice has been consistently and generally unchallenged, such interpretation and practice has particular weight when it has been followed by individuals charged with responsibility of its operation; and where such practice is disputed in later years, more weight should be given to interpretations made closer in time to the making of the law being construed. Citizens Band of Potawatonic Indians of Okl. v. U.S., 391 F.2d 614 (U.S. Ct. Cl. 1967), cert. denied, 389 U.S. 1049 (1968).

Applying the above principles to the facts here, the Solicitor's 1977 memorandum loses its persuasiveness because it failed to provide this court

with compelling reason by either legislative history or case law authority to clearly show Congress' intent to repeal the states' historical taxing power.

Since administrative interpretation over many years is entitled to great weight, C.I.R. v. First Sec. Bank of Utah, 405 U.S. 394 (1972), the Tribe is saddled with a particularly difficult burden to show that a statute's construction over many years has been clearly wrong. The Tribe has failed to do this. The court is bound by the plain meaning of the statute, past administrative interpretations and case law all upholding the validity of the statute. See, British-American Co. v. Board of Equalization of Montana, 299 U.S. 159 (1936). In short, the Tribe has

failed to overcome the presumption of this statute's validity.

Next, the Tribe argues that the failure of Congress to state the relationship between the 1924 taxing authority statute and the 1938 Act creates an ambiguity which must be resolved in favor of the Tribe. While this court is in agreement with the assertion that when statutes dealing with Indians are ambiguous, resolution of any ambiguity should be in favor of the Indian position, Bryan v. Itasca County, 426 U.S. 373 (1976), the court finds no ambiguity in the statutes.

The taxing power of the state in the 1924 Act is specific and clear. The fact that a later act was passed dealing with the general leasing scheme of tribal lands does not, without more, repeal or otherwise create an ambiguity which must

be resolved in favor of the Tribe's position. The failure of Congress to clearly repeal a well-known taxing power of the state is, in itself, an intention by Congress to leave the 1924 statute intact. Again this is reinforced by Congress' acquiescence, if you will, to 40 years of consistent statutory interpretation and the clause dealing with repeal of anything inconsistent with the new Act.

Nor does the Indian Reorganization Act, 25 U.S.C. §476, support the contention that the 1938 Act repealed the 1924 Act. The expressed congressional intent in enacting the I.R.A. was to further the achievement of economic independence for the Indian and for the establishment of an effective system of tribal self-government. This court

rejects any argument that the Act did anything to the 1924 Act.

Indeed, the I.R.A. supports a contrary conclusion. It is the purpose of the I.R.A. to allow Indians to enter the economic world on an equal footing; taxation statutes such as these are an economic fact of oil and gas production. Like the court in Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253, 1256 (9th Cir. 1976), when confronted by a similar issue, the court refuses to find that the Indian Reorganization Act supports a tax exemption for non-Indian lessees on Indian land. See also, Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 153-54 (1973).

Finally, it should be pointed out that neither the Tribe's citation to White Mountain Apache Tribe v. Bracker, 48 L.W. 4897 (June 27, 1980), or to

Central Machinery Co. v. Arizona State Tax Comme., 48 L.W. 4904 (June 27, 1980), are in point here. Both cases deal with state taxes which were struck down due to comprehensive federal regulation which preempted state taxes. In neither case was there any express congressional statement authorizing state taxation. In this case, however, we have specific congressional authorization for the state to tax oil and gas production on the Reservation.

Thus there is little or no evidence to support the assertion that the 1938 Act precludes the state from taxing oil and gas production on leased lands owned by the Tribe. The cardinal principle against subsilentio repeal is a rule of interpretation based upon probable congressional intent. Where, as here, there is no congressional signal other

than a subsequent passage of a comprehensive leasing law which neither authorizes nor precludes state taxation of leased lands owned by the Tribe, and coupled with the consistent judicial and administrative interpretation over the last quarter of a century, the court declines to rule that the state is stripped of its historical taxing power.

Therefore, the Montana oil and gas production taxation statutes are valid[2] as applied to the non-Indian lessees within the Blackfeet Indian Reservation. Defendants have shown there is no triable issue of fact and are entitled to summary judgment as a matter of law.

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2 Since the statutes are valid here, I need not reach the question of where the legal incidence of the tax falls. I only pause to note that where, as here, there can be no direct encumbrance on the lessor's interest, and where there is only an indirect economic effect on the Indian lessors, the legal

Accordingly, summary judgment is entered in favor of defendants and against plaintiffs in this action.

DATED this 6th day of January, 1981.

/s/
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

(Footnote 2 continued) incidence of the tax would most likely fall upon the non-Indian lessee. See, Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253, 1256 (9th Cir. 1976), and cases cited therein.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
GREAT FALLS DIVISION

THE BLACKFEET TRIBE OF INDIANS
Blackfeet Indian Reservation
Browning, Montana 59417

Plaintiff,

vs.

WILLIAM A. GROFF
Director, Montana Department of Revenue
Capitol Building, Helena, Montana 59601

STATE OF MONTANA
Governor's Office, Capitol Building
Helena, Montana 59601

GLACIER COUNTY, MONTANA
Court House
Cut Bank, Montana 59412

PONDERA COUNTY, MONTANA
Court House
Conrad, Montana 59425

No. CV-78-61-GF

FIRST AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND FOR DAMAGES

Plaintiff, by its attorneys, brings the action against defendants and complains as follows:

I. JURISDICTION

1. This action arises under 11 Stat. 657, 13 Stat. 85, 25 Stat. 113, 25 Stat. 676, 29 Stat. 350, 52 Stat. 347 (25 U.S.C., 396a-396f) and Title 84, Chapters 22, 62 and 70, and Section 60-145, Revised Codes of Montana, 1947. This Court's jurisdiction is based on 28 U.S.C., Sections 1362, 1331, 2201 and 2202. The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000.00). Venue is based on 28 U.S.C., Section 1391.

II. THE PLAINTIFF

2. Plaintiff Blackfeet Indian Tribe is a tribe of American Indians,

duly organized pursuant to the Indian Reorganization Act, 25 U.S.C. Section 461, et seq., whose governing body, its Tribal Council, is duly recognized as such by the Secretary of the Interior.

III. THE DEFENDANTS

3. Defendant William A. Groff is the duly appointed, qualified and acting Director of Revenue of the State of Montana, and as such officer is the chief administrative officer of the Montana Department of Revenue, and responsible for the levy and collection of taxes on royalty from the production of oil and gas in the State of Montana.

4. The State of Montana is a state of the United States of America created pursuant to the Enabling Act of February 22, 1889 (25 Stat. 676), and levies and collects taxes on royalty from

the production within its borders of oil and gas.

5. Glacier County is a body politic and corporate of the State of Montana, and as such levies and collects taxes on royalty from the production within its borders of oil and gas.

6. Pondera County is a body politic and corporate of the State of Montana, and as such levies and collects taxes on royalty from the production within its borders of oil and gas.

IV. RELEVANT STATUTES

7. 25 U.S.C., Section 398 (May 29, 1924, 43 Stat. 244) provides that unallotted Indian Reservation lands which are subject to being leased for mining purposes under the Act of February 28, 1891 (26 Stat. 795; 25 U.S.C. Section 397), may be leased by the Secretary of the Interior with the consent of the

Indians; and that the royalty from the production of oil and gas from such leased lands may be taxed by the state in which the lands are located as to the leases granted pursuant to the 1891 Act; the Secretary is authorized and directed to cause such taxes to be paid as to the leases granted pursuant to the 1891 Act.

8. 25 U.S.C., Section 397 (February 28, 1891; 26 Stat. 795) permitted the leasing for mining purposes of lands occupied by Indians who have bought and paid for the same.

9. 25 U.S.C., Section 396a (May 11, 1938; 52 Stat. 347), provides:

> Section 396a. Leases of unallotted lands for mining purposes
> Duration of leases
>
> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of

this Act (25 USCS Sections 396a and note-396g), may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. (May 11, 1938, c. 198, Sec. 1, 52 Stat. 347).

10. From January 1, 1969 to July 1, 1975 Section 84-2202, R.C.M. 1947, as amended, provided for an oil producers' license tax payable to the State of Montana of 2.1% of the gross value of production of oil only up to 450 barrels per lease and 2.65% of the gross value of production of oil only in excess of 450 barrels per lease; and provided also as to leases in existence on January 1, 1969 such tax was to be paid by the producer of the oil for the account of royalty owners, and that as to leases coming into existence after January 1, 1969 royalty

owners should be liable for their pro rata shares of such tax.

11. From and after July 1, 1975 Section 84-2202, R.C.M. 1947, as amended, has provided for a severance, (as opposed to a producers' license) tax payable to the department of revenue for the use of the State of Montana on production of both oil and natural gas, at a graduated rate, with such tax applicable to royalty interests and chargeable to the royalty interest owner unless otherwise provided in the lease or contract under which oil and gas are produced; and providing further that royalty interests that are owned by the federal government shall be exempt from taxation.

12. Throughout the period of time for which claim herein is made, Chapter 62 of Title 84, R.C.M. 1947, provided for a net proceeds tax on royalty from the

production of oil and gas in the State of Montana, which said net proceeds are assessed and taxed by the Montana Department of Revenue, and by the county assessor of the county from which the taxable production is made. Said tax is paid to the county from which the taxable production is made.

13. Chapter 79 of Title 84, R.C.M. 1947 has, since July 1, 1977, provided for a tax on royalty from the production of oil and gas in the State of Montana to provide for the creation of a resource indemnity trust. Said tax is paid to the Montana Department of Revenue.

14. Section 60-145 R.C.M. 1947 provides for a tax on royalty from the production of oil and gas in the State of Montana for the purpose of providing funds for the operation of the Board of Oil and Gas Conservation; said tax is

assessed by said Board and paid to the Montana State Treasurer.

15. Pursuant to the Treaty with Blackfeet of October 17, 1855 (11 Stat. 657) the United States reserved to the Blackfeet Tribe of Indians the exclusive control of a Reservation within the boundaries of the present State of Montana.

16. Pursuant to the Agreement of May 1, 1888 (25 Stat. 113), the Blackfeet Tribe of Indians ceded a portion of its 1855 Treaty Reservation, reserving to itself the portion not ceded.

17. Pursuant to the Agreement of September 26, 1896 (29 Stat. 350) the Blackfeet Tribe of Indians ceded a further portion of its 1855 Treaty Reservation, reserving to itself the portion not ceded.

18. The federal government's exclusive jurisdiction over plaintiff's lands was recognized and assumed by the United States in the Treaty of October 17, 1855 (11 Stat. 657) and by the Organic Act for the Territory of Montana (13 Stat. 85). Section 4 of the Enabling Act of 1889 (25 Stat. 676) enunciated the principle of exclusive jurisdiction by Congress over Indian lands in the State of Montana. Section 2 of Ordinance No. 1, Montana 1889 Constitution, contains a disclaimer of state jurisdiction over Indian lands. Article I, Montana 1972 Constitution, re-affirms the absolute jurisdiction and control of the Congress of the United States over lands owned by Indian tribes.

V. PLAINTIFF'S CONTENTIONS

19. That the 1938 Indian Mineral Leasing Act (25 U.S.C. 396) replaced and

supplanted the 1891 Indian Mineral Leasing Act (25 U.S.C. 397); the 1924 Act (25 U.S.C. 398) consents to state taxation of royalties from leases granted under the 1891 Act only; no Congressional consent has been given to defendants to tax royalties from leases granted under the 1938 Act.

20. That on November 7, 1977, the Solicitor of the United States Department of the Interior rendered an opinion to the Assistant Secretary of the Interior for Indian Affairs that taxation of oil royalties form Fort Peck Indian tribal lands--or lands of other tribes--by the State of Montana from leases granted pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347; 25 U.S.C. 396(a)-396(f) was contrary to law, illegal and unauthorized. A copy of said

opinion is attached hereto as Exhibit A and by this reference made a part hereof.

21. That notwithstanding the lack of consent to defendants by the United States Congress to tax plaintiff's royalties, as in paragraph 19 alleged, prior to July 1, 1975 the State of Montana had no statutory authority pursuant to Section 84-2202, or any other Montana statute, to tax plaintiff's royalty from production of natural gas.

22. That notwithstanding the lack of consent to defendants by the United States Congress to tax plaintiff's royalties, as in paragraph 19 alleged, after July 1, 1975 the State of Montana had no statutory authority in any event under Section 84-2202, as amended, to tax plaintiff's royalty from production of both oil and gas, because the statute as amended specifically exempts from the

said severance tax the taxation of royalty interests that are owned by the federal government; that legal title to plaintiff's royalty interests is in the federal government.

23. That upon information and belief plaintiff alleges that defendants have levied and collected taxes on plaintiff's royalty from production, as follows:

(a) Gas produced prior to July 1, 1975, pursuant to Section 84-2202 (Producers' License Tax).

(b) Oil and gas produced after July 1, 1975 pursuant to Section 84-2202 R.C.M. 1947, as amended (Severance Tax).

(c) Oil and Gas produced, pursuant to Chapter 62, Title 84 R.C.M. 1947 (Net Proceeds Tax).

(d) Oil and gas produced, pursuant to Chapter 70, Title 84, R.C.M. 1947 (Resource Indemnity Trust Act).

(e) Oil and gas produced, pursuant to Section 60-145, R.C.M. 1947 (Oil and Gas Conservation Act).

24. That the royalties from plaintiff's lands which are being leased pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347; 25 U.S.C. 396(a)-396(f) have been and are being taxed by defendants contrary to law.

25. That notwithstanding the said opinion alleged in paragraph 20 and notice and knowledge thereof, defendants continued to collect taxes on plaintiff's royalty and will continue to do so unless restrained therefrom.

26. That plaintiff has no adequate remedy at law.

27. That for six years last past by reason of the unauthorized and illegal taxation by defendants of the plaintiff's royalty interest in the production of oil and gas from plaintiff's lands, all as herein alleged, plaintiff has been damaged in an amount greatly in excess of ten thousand dollars ($10,000.00), the precise amount of which is better known to defendant.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That this Court enter a judgment declaring that no Congressional consent has been given to tax royalties on production from leases granted under the Indian Mineral Leasing Act of 1938 and that defendants, and each of them are prohibited from taxing plaintiff's royalty interests on the production of oil and gas from plaintiff's lands from

leases granted pursuant to the 1938 Indian Mineral Leasing Act.

2. That this Court enter a judgment declaring that notwithstanding defendant's general lack of authority to tax plaintiff's royalty interests in the production of oil and gas from plaintiff's lands, as prayed in paragraph 1, the oil and gas royalties of plaintiff are, also after July 1, 1975, specifically exempt from the tax imposed by defendant the State of Montana's oil and gas severance tax, Section 84-2202, R.C.M. 1947, and the gas royalties of plaintiff are, also before July 1, 1975, exempt from said tax.

3. That this Court enter an Order enjoining defendants, and each of them, from assessing, levying, imposing liens, or in any wise collecting or attempting to collect taxes upon plaintiff's royalty

interests in the production of oil and gas from plaintiff's lands from leases granted pursuant to the 1938 Indian Mineral Leasing Act.

4. That this Court, pending final determination of this complaint, issue a preliminary injunction, restraining and enjoining defendants, and each of them or anyone acting in their places and steads, in the aforesaid manner and form, or in the alternative that it order all such royalties paid into Court pending a final determination of the issues herein.

5. That pending a final decision in this cause, this Court order defendants to pay into Court taxes collected on royalties from plaintiff's leases granted pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347).

6. That this Court enter an order requiring defendants, and each of them, to render to plaintiff an accounting of all taxes collected by defendants for six years last past from plaintiff on plaintiff's royalty interests in the production of oil and gas from plaintiff's lands pursuant to leases granted under 25 U.S.C. 396 (57 Stat. 347).

7. That this Court render a judgment for plaintiff for the amount of taxes collected by defendant for six years last past and paid from plaintiff's said royalty interests aforesaid, together with interest at the rate of six percent (6%) per annum.

8. That this Court grant plaintiff such other and further relief as may be just and proper.

DATED this 23rd day of January, 1979.

/s/ John M. Schiltz
for Dale L. McGarvey
745 South Main
Kalispell, Montana 59901

Attorney of Record

APPENDIX E

UNITED STATES STATUTES AT LARGE

Act of Feb. 28, 1891, ch. 383,
26 Stat. 795, codified at
25 U.S.C. § 397

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: Provided, That where lands are

occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

<u>Act of May 29, 1924, ch. 210,</u>

<u>43 Stat. 244, codified at</u>

<u>25 U.S.C. § 398</u>

An Act To Authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the Act of February 28, 1891.

<u>Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled</u>, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council

speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: <u>Provided</u>, That the production of oil or gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: <u>Provided</u>, <u>however</u>, That such tax shall not become a lien or charge of any kind

or character against the land or the property of the Indian owner.

Act of June 18, 1934, ch. 576,
48 Stat. 984, codified as amended
at 25 U.S.C. §§ 461-479

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur,

as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: <u>Provided further</u>, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: <u>Provided further</u>,

That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: <u>Provided further</u>, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: <u>Provided further</u>, That patentee shall

also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917,

creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the

subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted

allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian

Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on

the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established

as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous

appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have

the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: Provided, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole.

Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and

carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets

in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as

hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its

tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor

interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Act of May 11, 1938, ch. 198, 52 Stat. 347, codified as amended at 25 U.S.C. §§ 396a-396g

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil- and/or gas-mining purposes covering such

unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a

lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the

said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said

Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act[1] or parts of Acts inconsistent herewith are hereby repealed.

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1 So in original.

APPENDIX F

OIL AND GAS NET PROCEEDS TAX,

MONTANA CODE ANNOTATED,

CHAPTER 15, PART 23

15-23-601. Definitions. As used in this part, the following definitions apply:

(1) "Excise tax" means the windfall profit tax on domestic crude oil imposed by Title I of the federal Crude Oil Windfall Profit Tax Act of 1980, as enacted or as amended.

(2) The terms "operator" and "producer" mean any person who engages in the business of drilling for, extracting, or producing any natural gas, petroleum, or other crude or mineral oil.

(3) The term "well" includes each single well or group of wells, including dry wells, in one field or production

unit and under the control of one operator or producer.

Compiler's Comments

1981 Amendment: Inserted the lead-in phrase and subsection (1) defining "Excise tax".

15-23-602. Statement of sales proceeds. Each operator or producer of natural gas, petroleum, or other crude or mineral oil must on or before April 15 in each year make out and deliver to the department of revenue a statement of the gross sales proceeds of such natural gas, petroleum, or other crude or mineral oil from each well owned or worked by such person during the next preceding calendar year. The gross sales proceeds shall be determined by multiplying the units of production sold from the well times the royalty unit value of that production at the well. Such statement shall be in the form prescribed by the department and

must be verified by the oath of the operator or producer or the manager, superintendent, agent, president, or vice-president of such corporation, association, or partnership. Such statement shall show the following:

(1) the name and address of the operator, together with a list in duplicate of the names and addresses of any and all persons owning or claiming any royalty interest in the production from the well or the proceeds derived from the sale thereof, and the amount or amounts paid or yielded as royalty to each of such persons during the period covered by the statement;

(2) the description and location of the well;

(3) the number of cubic feet of natural gas, barrels of petroleum or other crude or mineral oil sold from the

well during the period covered by the statement;

(4) the gross sales proceeds in dollars and cents or, in the case of sales between parties not acting at arm's length, the greater of the gross sales proceeds from or the fair market value of the products sold;

(5) actual cost of extracting product from well;

(6) cost of construction, repairs, and betterments;

(7) actual cost of fire insurance and workers' compensation insurance;

(8) the amount paid or withheld in satisfaction of liability for excise taxes imposed by the U.S. government on the production, sale, or removal of the natural gas, petroleum, or other crude or mineral oil reported pursuant to subsection (3), including a separate

statement of the amount of such taxes paid or withheld from each royalty owner.

Compiler's Comments

1983 Amendment: In first sentence, after "on or before" changed "March 31" to "April 15"; amendment applicable to reports or returns filed after December 31, 1982.

1981 Amendments: Chapter 425 substituted "sales proceeds" for "yield" in the middle of the first sentence; substituted the second sentence for "and the value thereof" that was at the end of the first sentence; substituted "sold" for "extracted or produced" in (3); substituted language in (4) for "the gross yield or value in dollars and cents".
Chapter 525 added subsection (8).

15-23-603. Net proceeds -- how computed. (1) The department of revenue shall calculate and compute from the returns the gross sales proceeds of the product yielded from such well for the year covered by the statement and shall calculate the net proceeds of the well yielded to the producer, which net proceeds shall be determined by

subtracting from the gross sales proceeds thereof the following:

(a) all royalty paid in cash by the operator or producer and the gross value of all royalty apportioned in kind by the operator or producer that shall be determined by using as the value of a barrel of oil or a cubic foot of gas the average selling price for the calendar year of a barrel of oil or a cubic foot of gas from the well out of which the royalty was paid;

(b) all moneys expended for necessary labor, machinery, and supplies needed and used in the operation and development;

(c) all moneys expended for improvements, repairs, and betterments necessary in and about the working of the well;

(d) all moneys expended for fire insurance and workers' compensation insurance and for payments by operators to welfare and retirement funds when provided for in wage contracts between operators and employees;

(e) 70% of the amount paid or withheld in satisfaction of liability for excise taxes imposed by the U.S. government on the production, sale, or removal of the natural gas, petroleum, or other crude or mineral oil yielded from such well, other than the amount of such taxes paid by or withheld from each royalty owner.

(2) No moneys invested in the well and improvements during any year except the year for which such statement is made may be included in such expenditures, except as provided in 15-23-604, and such expenditures may not include the salaries

or any portion thereof of any person or officer not actually engaged in the working of the well or superintending the management thereof.

Compiler's Comments

1983 Amendment: At beginning of (1)(e), inserted "70% of"; deleted former (2), which read: "The value arrived at under subsection (1) shall be increased by the amount of any refund received from the U.S. government to the extent that the amount refunded was used to reduce the value of the gross products under subsection (1)(e)."

Section 5, Ch. 383, L. 1983, provided that the amendment applies retroactively to production years beginning on or after January 1, 1980.

1981 Amendments: Chapter 425 substituted "gross sales proceeds" for "gross value" in the net proceeds formula in two places in (1); deleted "or apportioned" before "in cash" and "or in kind" after "in cash" near the beginning of (1)(a); added all language after "in cash by the operator or producer" in (1)(a).

Chapter 525 inserted subsections (1)(e) and (2) (now deleted).

15-23-604 omitted.

15-23-605. Assessment of royalties. The amount of royalty received, valued as provided in 15-23-603(1)(a), less 70% of the amount of excise taxes paid by or withheld from the royalty owner as reported pursuant to 15-23-602(8), shall be considered net proceeds to the recipient and shall be assessed as follows: upon receipt of the lists or schedules setting forth the names and addresses of any and all persons owning or claiming royalty and the amount paid or yielded as royalty to such royalty owners or claimants during the year for which such return is made, the department of revenue shall proceed to assess and tax the same as net proceeds of mines.

Compiler's Comments

1983 Amendment: Near beginning of section, after "less" inserted "70% of"; deleted former (2), which read: "The net proceeds to a recipient shall be increased by any refund of an excise tax to the

extent that the amount refunded was used to reduce the value of the royalty received under subsection (1)."

Section 5, Ch. 383, L. 1983, provided that the amendment applies retroactively to production years beginning on or after January 1, 1980.

1981 Amendments: Chapter 425 inserted "valued as provided in 15-23-603(1)(a)" after "The amount of royalty received" near the beginning of the section.

Chapter 525 inserted ", less the amount of excise taxes paid by or withheld from the royalty owner as reported pursuant to 15-23-602(8)," after "royalty received" at the beginning of (1); added subsection (2) (now deleted).

15-23-606 omitted.

15-23-607. County assessors to compute taxes. (1) Immediately after the board of county commissioners has fixed tax levies on the second Monday in August, the county assessor shall compute the taxes on such net proceeds, except as provided in 15-36-121, and royalty assessments and shall deliver the book to

the county treasurer on or before September 15. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law.

(2) The operator or producer shall be liable for the payment of said taxes and same shall be payable by and shall be collected from such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that the operator may at his option withhold from the proceeds of royalty interest, either in kind or in money, an estimated amount of the tax to be paid by him upon such royalty or royalty interest. After such withholding any deviation between the estimated tax and the actual tax may be accounted for by

adjusting subsequent withholdings from the proceeds of royalty interests.

15-23-608. Lien of tax and penalty -- enforcement of payment. (1) The taxes and/or penalties on such net proceeds must be levied as the levy of other taxes is provided for. Every such tax and/or penalty is a lien upon the mine from which the natural gas, petroleum, or crude or mineral oil is mined or extracted and is a prior lien upon all personal property and improvements used in the process of extracting such natural gas, petroleum, or crude or mineral oil; provided, however, that such personal or real property is owned by or under lease by the person who extracted said natural gas, petroleum, or other crude or mineral oil.

(2) The tax and/or penalty on such net proceeds may be collected and the payment thereof enforced by the seizure and sale of the personal property upon which the tax and/or penalty is a lien in the same manner as other personal property is seized and sold for delinquent taxes or by the sale of the mine and improvements as provided for the sale of real property for delinquent taxes or by the institution of a civil action for its collection in any court of competent jurisdiction; provided, however, that a resort to any one of the methods of enforcing collection, as herein provided for, shall not bar the right to resort to either or both of the other methods but that any two or all of the methods herein provided for may be

used until the full amount of such tax and/or penalty is collected.

15-23-609 through 15-23-616 omitted.

OIL AND GAS SEVERANCE TAX,

MONTANA CODE ANNOTATED,

CHAPTER 36, PART 1

15-36-101. Definitions and rate of tax. (1) Every person engaging in or carrying on the business of producing petroleum, other mineral or crude oil, or natural gas within this state or engaging in or carrying on the business of owning, controlling, managing, leasing, or operating within this state any well or wells from which any merchantable or marketable petroleum, other mineral or crude oil, or natural gas is extracted or produced sufficient in quantity to justify the marketing of the same must, except as provided in 15-36-121, each year when engaged in or carrying on any such business in this state pay to the department of revenue for the exclusive

use and benefit of the state of Montana a severance tax computed at the following rates:

(a) 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit on or after April 1, 1981, and on or before March 31, 1983; 6% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit on or after April 1, 1983, and on or before March 31, 1985; and 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit thereafter; but in determining the amount of such tax there shall be excluded from consideration all petroleum or other crude or mineral oil produced and used by such person during such year in

connection with his operations in prospecting for, developing, and producing such petroleum or crude or mineral oil;

(b) 2.65% of the total gross value of natural gas produced from each lease or unit; but in determining the amount of such tax there shall be excluded from consideration all gas produced and used by such person during such year in connection with his operations in prospecting for, developing, and producing such gas or petroleum or crude or mineral oil; and there shall also be excluded from consideration all gas recycled or reinjected into the ground.

(2) Nothing in this part may be construed as requiring laborers or employees hired or employed by any person to drill any oil well or to work in or about any oil well or prospect or explore

for or do any work for the purpose of developing any petroleum or other mineral or crude oil to pay such severance tax, nor may any work done or the drilling of any well or wells for the purpose of prospecting or exploring for petroleum or other mineral or crude oils or for the purpose of developing same be considered to be the engaging in or carrying on of any such business. If, in the doing of any such work, in the drilling of any oil well, or in such prospecting, exploring, or development work, any merchantable or marketable petroleum or other mineral or crude oil in excess of the quantity required by such person for carrying on such operation is produced sufficient in quantity to justify the marketing of the same, such work, drilling, prospecting, exploring, or development work is considered to be the engaging in and

carrying on of such business within this state within the meaning of this section.

(3) Every person required to pay such tax hereunder shall pay the same in full for his own account and for the account of each of the other owner or owners of the gross proceeds in value or in kind of all the marketable petroleum or other mineral or crude oil or natural gas extracted and produced, including owner or owners of working interest, royalty interest, overriding royalty interest, carried working interest, net proceeds interest, production payments, and all other interest or interests owned or carved out of the total gross proceeds in value or in kind of such extracted marketable petroleum or other mineral or crude oil or natural gas, except that any of the aforesaid interest that are owned by the federal, state, county, or

municipal governments shall be exempt from taxation under this chapter. Unless otherwise provided in a contract or lease, the pro rata share of any royalty owner or owners will be deducted from any settlements under said lease or leases or division of proceeds orders or other contracts.

Compiler's Comments

1983 Amendment: In middle of (1)(a) inserted "on or after April 1, 1983, and on or before March 31, 1985; and 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit".

1981 Amendment: Increased the severance tax on petroleum from 2.1% of the first $6,000 and 2.65% of the production in excess of $6,000 to 5% of the production between April 1, 1981, and March 31, 1983, and 6% thereafter; and deleted subsection (3), which provided for combining all leases in a unitized area for purposes of applying either the 2.1% rate or the 2.65% rate.

15-36-102 omitted.

15-36-103. Determination of gross value of product. The total gross value of all petroleum and other mineral or crude oil or natural gas produced each year shall be determined by taking the total number of barrels or cubic feet thereof produced each month during such year at the average value at the mouth of the well during the month the same is produced, as determined by the department of revenue; provided, however, that in computing the total number of barrels of petroleum and other mineral or crude oil or cubic feet of gas produced, there shall be deducted therefrom so much thereof as is used by such person in connection with the operation of the well from which said oil or gas is produced or for pumping said petroleum or other mineral or crude oil or gas from the said well to a tank or pipeline.

15-36-104 omitted.

15-36-105. Statement to accompany payment -- records -- collection of tax -- refunds. (1) Each and every person must, within 60 days after the end of each following quarter, make out on forms prescribed by the department of revenue a statement showing the total number of barrels of merchantable or marketable petroleum and other mineral or crude oil or cubic feet of natural gas produced or extracted by such person in the state during each month of such quarter and during the whole quarter, the average value thereof during each month, and the total value thereof for the whole quarter, together with the total amount due to the state as severance taxes for such quarter, and must within such 60 days deliver such statement, and, except

as provided in 15-36-121, pay to the department the amount of the taxes shown by such statement to be due to the state for the quarter for which such statement is made. Such statement must be signed by the individual or the president, vice-president, treasurer, assistant treasurer, or managing agent in this state of the association, corporation, joint-stock company, or syndicate making the statement. Any such person engaged in carrying on such business at more than one place in this state or owning, leasing, controlling, or operating more than one oil or gas well in this state may include all thereof in one statement. The department shall receive and file all such statements and collect and receive from such person making and filing a statement the amount of tax payable by

such person, if any, as the same shall appear from the face of the statement.

(2) It shall be the duty of the department to examine each of such statements and compute the taxes thereon, and the amount so computed by the department shall be the taxes imposed, assessed against, and payable by the taxpayer making the statement for the quarter for which the statement is filed. If the tax found to be due shall be greater than the amount paid, the excess shall be paid by the taxpayer to the department within 10 days after written notice of the amount of the deficiency shall be mailed by the department to such taxpayer. If the tax imposed shall be less than the amount paid, the difference must be applied as a credit against tax liability for subsequent quarters or

refunded if there is no subsequent tax liability.

Compiler's Comments

1981 Amendment: Substituted "signed by the individual or the president" for "signed and verified by the oath of the individual or individuals or by the president" in the second sentence of (1); substituted "statement" for "same" at the end of the second sentence of (1).

15-36-106 through 15-36-122 omitted.

RESOURCE INDEMNITY TRUST TAX,

MONTANA CODE ANNOTATED,

CHAPTER 38, PART 1

15-38-101 and 15-38-102 omitted.

15-38-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Department" means department of revenue.

(2) "Gross value of product" means the market value of any merchantable mineral extracted or produced during the taxable year.

(3) "Mineral" means any precious stones or gems, gold, silver, copper, coal, lead, petroleum, natural gas, oil, uranium, or other nonrenewable merchantable products extracted from the surface or subsurface of the state of Montana.

(4) "Total environment" means air, water, soil, flora, and fauna and the social, economic, and cultural conditions that influence communities and individual citizens.

15-38-104. Tax on mineral production. The annual tax to be paid by the person engaged in or carrying on the business of mining, extracting, or producing a mineral shall be $25, together with an additional sum or amount computed on the gross value of product which may have been derived from the business work or operation within this state during the calendar year immediately preceding at the rate of 1/2 of 1% of the amount of gross value of product at the time of extraction from the ground, if in excess of $5,000. Unless otherwise provided in a contract

or lease, the pro rata share of any royalty owner or owners may be deducted from any settlements under the lease or leases or division of proceeds orders or other contracts.

15-38-105. Report of gross yield from mines. A person who engages in or carries on the business of mining, extracting, or producing a mineral from any quartz vein or lode, placer claim, dump or tailings, or other place or source shall make out a quarterly statement of gross yield of the mineral from each mine owned or worked by that person during the quarter. This form shall be in the form prescribed by the department and shall be signed by the person or the manager, superintendent, agent, president, or vice-president of the corporation, association, or

partnership, if any, and shall be delivered to the department on or before the 60th day following the end of the calendar quarter. The statement shall show the following:

(1) the name and address of the owner or lessee or operator of the mine;

(2) the description and location of the mine;

(3) the quantity of minerals extracted, produced, and treated or sold from the mine during the period covered by the statement;

(4) the amount and character of the mineral and the total yield of the mineral from the mine in constituents of commercial value; that is to say, the number of ounces of gold or silver, pounds of copper or lead, tons of coal, barrels of petroleum or other crude or mineral oil, cubic feet of natural gas,

or other commercially valuable constituents of the ores or mineral products or deposits yielded to the person engaged in mining measured by standard units of measurement;

(5) the gross yield or value in dollars and cents.

Compiler's Comments

1983 Amendment: In first sentence, substituted "quarterly" for "on or before March 31 of each year", and substituted "quarter" for "year preceding January 1 of the year in which the statement is made and the value thereof"; and at end of second sentence, substituted "the 60th day following the end of the calendar quarter" for "March 31".
1981 Amendment: Substituted "signed by the person" for "verified by the oath of the person" in the second sentence.

15-38-106. Payment of tax -- records -- collection of taxes -- refunds. (1) The tax imposed by this chapter shall be paid by each person to which the tax applies, on or before March 1, on the value of product in the year

preceding January 1 of the year in which the tax is paid. The tax shall be paid to the department at the time the statement of yield for the last calendar quarter is filed with the department.

(2) The department shall deposit the proceeds of the tax in the resource indemnity trust fund of the nonexpendable trust fund type. Every person to whom the tax applies shall keep records in accordance with 15-38-105, and the records are subject to inspection by the department upon reasonable notice during normal business hours.

(3) The department shall examine each of the four quarterly statements and compute the taxes thereon, and the amount computed by the department shall be the taxes imposed, assessed against, and payable by the taxpayer. If the tax found to be due is greater than the

amount paid, the excess shall be paid by the taxpayer to the department within 30 days after written notice of the amount of deficiency is mailed by the department to the taxpayer. If the tax imposed is less than the amount paid, the difference must be applied as a tax credit against tax liability for subsequent years or refunded if requested by the taxpayer.

Compiler's Comments

1983 Amendments: Chapter 226 made the following changes: in (1), changed payment deadline from March 31 to March 1; near end of last sentence in (1), after "yield" inserted "for the last calendar quarter"; near beginning of first sentence in (3), inserted "four quarterly" before "statements"; at end of first sentence in (3), deleted "making the statement for the year for which the statement is filed"; and made minor phraseology changes.

Chapter 281, in first sentence of (2), substituted "trust fund of the nonexpendable trust fund type" for "trust account of the trust and legacy fund".

15-38-107 omitted.

15-38-108 [prior to 1981 amendment] Lien for collection. The tax assessed against any person under this chapter, together with penalties and interest thereon, shall be a lien upon any and all property owned by such person within this state, which lien shall attach on the date the department files in the office of the county clerk in the county where such property is situated a certified copy of its letter sent under 15-38-107(2). This lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded and may be enforced in the name of the state of Montana in the same manner as judgment liens are enforced by law.

15-38-108 [after 1981 amendment] Warrant for distraint. If all or part of the tax imposed by this chapter is not

paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded.

Compiler's Comments

1981 Amendment: Substituted the first sentence for a procedure whereby the department filed a lien on all real property of the taxpayer; and deleted provision at the end of the section providing that the lien may be enforced in the same manner as judgment liens are enforced.

15-38-109 through 15-38-112 omitted.

OIL AND GAS CONSERVATION TAX,

MONTANA CODE ANNOTATED,

TITLE 82, CHAPTER 11

82-11-101. [in pertinent part] Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Board" means the board of oil and gas conservation provided for in 2-15-3303.

(2) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

. . . .

(8) "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and

others, and the term includes all persons holding such authority by or through him.

....

(11) "Producer" means the owner of a well or wells capable of producing oil or gas or both.

82-11-102 through 82-11-130 omitted.

82-11-131. Privilege and license tax. (1) For the purpose of providing funds for defraying the expenses of the operation and enforcement of this chapter and expenses of the board, an operator or producer of oil and gas shall pay an assessment not to exceed 2/10 of 1% of the market value of each barrel of crude petroleum originally produced, saved and marketed, or stored within the state or exported from the state and the same rate on the market value of each 10,000 cubic

feet of natural gas produced, saved and marketed, or stored within the state or exported therefrom.

(2) The board shall, by rule adopted pursuant to the provisions of the Montana Administrative Procedure Act, fix the amount of the assessment and may from time to time reduce or increase the amount thereof as the expenses chargeable against the oil and gas conservation fund may require. However, the assessment fixed by the board may not exceed the limits prescribed in this section. The amount of the assessment shall be a percentage factor (not to exceed 100%) of the rate set forth in subsection (1) above, and the same percentage factor shall be applied by the board in fixing the amount of the assessment on each barrel of crude production and each 10,000 cubic feet of natural gas

mentioned in that subsection. A producer of the crude petroleum and natural gas shall pay the assessment on each barrel of crude petroleum and each 10,000 cubic feet of natural gas produced for himself, as well as for another, including a royalty holder, and the producer shall be reimbursed for the payments made on crude oil and natural gas produced for another in the same manner as he is reimbursed for net proceeds tax paid on crude petroleum or natural gas produced for another under 15-23-607.

(3) The department of revenue shall collect the privilege and license tax assessment in the same manner as the oil and gas severance tax is collected under Title 15, chapter 36.

Compiler's Comments

1983 Amendment: Near beginning of (2), after "shall" substituted phrase relating to the Administrative Procedure Act for "by

order, without prior notice or hearing"; after "may from time to time" deleted "without prior notice or hearing"; after "increase the amount thereof as" deleted "in its judgment"; and inserted (3).

82-11-132. Statements to treasurer and payment of tax. (1) Each producer of crude petroleum in the state shall, not later than the last day of each of the calendar months of February, May, August, and November of each calendar year, render a true statement to the state treasurer, the department of revenue, and the board, duly signed and sworn to, of all crude petroleum produced and marketed by him in this state during the preceding quarter and containing such other information as the board may require and shall accompany the statement with the payment to the state treasurer of the assessment provided for in 82-11-131(1) for the period covered by the statement.

(2) Each producer of natural gas in the state shall render like statements to the state treasurer, the department of revenue, and the board of all natural gas produced and marketed by him in this state and shall make payment of the assessment provided for in 82-11-131(1) at such times and for such periods as may be prescribed by rule of the board.

(3) Any producer carrying on business at more than one place or location in this state may include all those places of business in one statement.

(4) The assessment imposed herein shall be due at the time the oil or natural gas is marketed. Oil or natural gas shall be deemed marketed when it is removed from the property from which it was produced.

Compiler's Comments

1983 Amendment: In (1) after "statement to the state treasurer", substituted "the department of revenue, and the board" for "and a duplicate thereof to the board"; and in (2), after "statements to the state treasurer" inserted "the department of revenue, and the board".

82-11-133 through 82-11-140 omitted.

APPENDIX G

OIL OR GAS PRODUCERS' SEVERANCE TAX, REVISED CODES OF MONTANA, 1947

TITLE 84, CHAPTER 22

84-2202. (2398) Oil or gas producers' severance tax--amount--exceptions. (1) Every person engaging in or carrying on the business of producing petroleum, other mineral or crude oil, or natural gas within this state or engaging in or carrying on the business of owning, controlling, managing, leasing, or operating within this state any well or wells from which any merchantable or marketable petroleum, other mineral or crude oil, or natural gas is extracted or produced sufficient in quantity to justify the marketing of the same must, except as provided in 84-2213, each year when engaged in or carrying on any such

business in this state, pay to the department of revenue, for the exclusive use and benefit of the state of Montana, a severance tax computed at the following rates:

(a) Two and one-tenth per cent (2.1%) of the total gross value of that portion of all the petroleum and other mineral or crude oil produced by such person from each lease or unit in the calendar quarter not in excess of an amount obtained by multiplying the number of producing wells on such lease or unit by four hundred fifty (450) barrels.

(b) Two and sixty-five hundredths per cent (2.65%) of the total gross value of that portion of all the production of such person from each lease or unit in each calendar quarter in excess of four hundred fifty (450) barrels multiplied by the number of producing wells on such

lease or unit; but in determining the amount of such tax there shall be excluded from consideration all petroleum, or other crude or mineral oil produced and used by such person during such year in connection with his operations in prospecting for, developing and producing such petroleum, crude or mineral oil; provided, however, that nothing in this act shall be construed as requiring laborers or employees, hired or employed by any person, to drill any oil well, or to work in or about any oil well, or prospect or explore for, or do any work for the purpose of developing any petroleum or other mineral or crude oil to pay such severance tax, nor shall any work be done, or the drilling of any well or wells, for the purpose of prospecting or exploring for petroleum or other mineral or crude oils, or for the

purpose of developing same, be deemed to be engaging in or carrying on of any such business; provided, further, that in the doing of any such work, or in the drilling of any oil well, or in such prospecting, exploring or development work, any merchantable or marketable petroleum or other mineral or crude oil in excess of the quantity required by such person for carrying on such operation shall be produced sufficient in quantity to justify the marketing of the same, then such work, drilling, prospecting, exploring or development work is considered to be the engaging in and carrying on of such business within this state within the meaning of this section.

(c) 2.65% of the total gross value of natural gas produced from each lease or unit, but in determining the amount of

such tax there shall be excluded from consideration all gas produced and used by such person during such year in connection with his operations in prospecting for, developing, and producing such gas or petroleum or crude or mineral oil; and there shall also be excluded from consideration all gas recycled or reinjected into the ground.

(2) For purposes of computing the tax in subsections (1)(a) and (1)(b) above, lease count includes all leases contributing to the unitized area within a unit or all tracts within a unit participating in production.

(3) Every person required to pay such tax hereunder shall pay the same in full for his own account and for the account of each of the other owner or owners of the gross proceeds in value or in kind of all the marketable petroleum

or other mineral or crude oil or natural gas extracted and produced, including owner or owners of working interest, royalty interest, overriding royalty interest, carried working interest, net proceeds interest, production payments, and all other interest or interests owned or carved out of the total gross proceeds in value or in kind of such extracted marketable petroleum or other mineral or crude oil or natural gas, except that any of the aforesaid interests that are owned by the federal, state, county, or municipal governments shall be exempt from taxation under this chapter. Unless otherwise provided in a contract or lease, the pro rata share of any royalty owner or owners will be deducted from any settlements under said lease or leases or division of proceeds orders or other contracts.

84-2203 omitted.

84-2204. (2400) Determination of gross value of product. The total gross value of all petroleum, and other mineral or crude oil or natural gas produced each year shall be determined by taking the total number of barrels or cubic feet thereof produced each month during such year at the average value at the mouth of the well during the month the same is produced, as determined by the state department of revenue; provided, however, that in computing the total number of barrels of petroleum, and other mineral or crude oil or cubic feet of gas produced, there shall be deducted therefrom so much thereof as is used by such person in connection with the operation of the well from which said oil or gas is produced or for pumping said

petroleum or other mineral or crude oil or gas from the said well to a tank or pipeline.

84-2205. (2401) Producers to file reports. Each and every person engaged in such business in the state of Montana at the date when this act becomes effective, must, not later than the thirtieth day of April, 1923, and every person who shall engage in such business at any time after the date when this act becomes effective, must, immediately upon engaging in such business, file with the state department of revenue, a certificate and statement, on forms prescribed by the state department of revenue, which shall contain the name under which such person is engaging in and carrying on such business in this state, giving the place or places of

business and location of the well or wells owned, leased, controlled or operated by such person; the name and address of the managing agent in this state, if an association, corporation, joint-stock company, or syndicate, or if a firm or copartnership, the names and addresses of the persons composing the same; if an association, joint-stock company, corporation or syndicate, under the laws of what state organized, its principal place of business, and the names and addresses of its principal officers; and such other information as the department may deem necessary.

84-2206 through 84-2209 omitted.

84-2209.1 Procedure for collection of tax. All tax, penalty, and interest due from any person under this act shall

be a lien upon any and all real property of such person when the department of revenue files in the office of the county clerk in the county where such real property is situated a certified copy of its statement of estimated tax computed under 84-2209. This lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded and may be enforced in the name of the state of Montana in the same manner as judgment liens are enforced by law.

84-2212 and 84-2213 omitted.

APPENDIX H

58 Interior Dec. 535 (1943),

"Liability of Indian Tribes for State Taxes Imposed on Royalty Received From Oil and Gas Leases"

HARPER, Solicitor:

You [Secretary of the Interior] have presented for my opinion the question of the liability of the Ute Mountain and Blackfeet Tribes of Indians for certain taxes imposed by the States of New Mexico and Montana, respectively, on the tribes' royalty interests in oil and gas mining leases. Both of these tribes receive royalty from leases executed pursuant to section 3 of the act of February 28, 1891

(26 Stat. 795), as amended by the act of May 29, 1924 (43 Stat. 244, 25 U.S.C. sec. 398), authorizing the leasing of unallotted Indian lands for mining purposes. The amendatory act of May 29, 1924, supra, provides that--

> * * * the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The question for consideration is whether the permission granted by Congress for the taxation of the production of oil and gas extends to the particular taxes which the States of New Mexico and Montana are attempting to

collect from the royalty interests of the Indians.

The State of New Mexico levies what is known as a severance tax on certain natural resource products, including oil and gas, severed from the soil of the State. Such tax is payable by the owner or proportionately by the owners thereof at the time of the severance.[1] The rate of the tax on oil is two percent of the value thereof.[2] The tax is required to be paid by those actually engaged in the operation of severing. The reporting taxpayer is authorized to collect and withhold out of the value of said products so severed the proportionate parts of the total tax due from the

1 Laws of New Mexico, 1937, ch. 103, sec. 1; sec. 76-1031, New Mexico Stat., 1941, Ann.

2 Sec. 2; 76-1302.

respective owners of the severed products at the time of the severance.[3]

The act provides:

> Every person actually engaged in the severing of any of said products mentioned herein from the soil or actually operating the properties from which said products are severed under contracts or agreements requiring royalty interest, excess royalty, or working interest, either in money or in kind, is hereby authorized, empowered, and required to deduct from any amount due or from anything due, the amount of tax herein levied before making such payments; Provided, however, no such deductions shall be made from any amount or amounts due the United States of America or the State of New Mexico as royalty or rental payments.[4]

The act further provides:

3 Sec. 6; 76-1306.

4 Sec. 7; 76-1307.

> The payment of the severance tax levied by this act shall be in addition to and shall not affect the liability of the party or parties so taxed for the payment of all state, county, municipal, district and special taxes levied upon their real estate and other corporeal property, including the emergency school tax, production, and other special taxes. No severance tax shall be levied by any county or other political subdivision of the state.[5]

Both the States of New Mexico and Montana have in recent years set up administrative agencies for the regulation of oil and gas wells and both States levy a tax on oil produced in addition to all other taxes for the purpose of meeting the expense of such boards. Both States are attempting to collect these taxes from the royalty interests of the Indians.

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5 Sec. 15; 76-1315.

The State of New Mexico levies a tax of one-eighth of one per cent on the proceeds of all oil and gas produced in the State except royalties payable to the United States[6] or to the State[7]. For the purposes of this opinion I shall designate this tax as "the oil conservation fund tax." The tax is collected in the same manner as the severance tax is collected.

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6 The State cannot be presumed to have intended to include the Indians' royalty interests in the exemptions granted on royalty paid to the United States in this and in the severance tax act. See in this connection Laws of New Mexico, 1925, ch. 83, sec. 2, p. 126; sec. 76-1002, New Mexico Statutes, 1941, Annotated, where the State legislature, in providing for an operators' net proceeds tax, permits the deduction of royalties paid "to the United States, or to any Indian tribe or Indian, being wards of the United States, or the State of New Mexico."

7 Laws of New Mexico, 1935, ch. 72, sec. 25; sec. 69-231, New Mexico Statutes, 1941, Annotated.

The State of Montana levies what it terms a "privilege and license tax" of one-fourth of one cent on every barrel of petroleum produced in the State. The producers are required to pay the tax on petroleum produced for themselves as well as for royalty holders and are to be reimbursed by the royalty holders for the tax paid on their interests in the same manner as the producers are reimbursed for the net proceeds tax paid on crude petroleum produced for others.[8]

In my opinion, all of these taxes are within the permissive act of Congress and must be paid out of the royalty interests of the Indians.

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8 Laws of Montana, 1937, ch. 123, sec. 1; Revised Codes of Montana, 1935, vol. 2, 1939 pocket part, sec. 3554.14.

The act of May 29, 1924, <u>supra</u>, was considered by the Supreme Court of Montana in the case of <u>British-American Oil Producing Company v. Board of Equalization, et al.</u>, 54 P.(2d) 129. There the oil company, the owner of a producing oil and gas lease on lands within the Blackfeet Indian Reservation, sought to enjoin the State Board of Equalization from collecting the Montana "corporation license tax," the "operators' net proceeds tax," an oil producers' license tax termed by the court a "gross production tax," and the "royalty owners' net proceeds tax" all arising out of the production and recovery of oil from the leased lands. The Blackfeet Tribe intervened, alleging that by reason of certain treaties and acts of Congress the lands embraced

within its reservation were tax exempt and that the oil produced from the tax-exempt lands and the royalty derived from the production of oil were likewise exempt from taxation.

The Montana Supreme Court and the United States Supreme Court on appeal[9] ruled that all of these taxes fell within the permission given by the act of 1924.[10] The taxes under consideration

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9 299 U.S. 159.

10 Both courts assumed, under the then prevailing rule laid down in Choctaw, O. & Gulf R.R. Co. v. Harrison, 235 U. S. 292; Indian Territory Co. v. Oklahoma, 240 U. S. 522; and Jaybird Mining Co. v. Weir, 271 U. S. 609, that even a lessee's interest in oil produced from restricted Indian lands could not be taxed without the consent of Congress. While that rule has now been renounced (Helvering v. Mountain Producers Corporation, 303 U. S. 376), so that the State is free to tax a lessee's interest without congressional consent, the renunciation of this rule does not detract in any way from the validity of

must likewise be held to be within that permission. The language of the statute is that the "production of oil and gas and other minerals * * * may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands." All that is essential to the validity of the tax under this broad language is that the tax be one on mineral production and that it be exacted from production on unrestricted lands. The taxes under consideration meet both of these requirements.

My attention has been called to the fact that the Office of Indian Affairs at

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(Footnote 10, continued) the interpretation given by the courts in this case to the 1924 act so far as it affects the taxation of the Indians' royalty interests.

one time authorized the payment of the Blackfeet Tribe's proportionate share of the Montana "privilege and license tax" but that the Department has recently refused to authorize the payment of this tax as well as "the oil conservation fund tax" levied by the State of New Mexico. Such refusal was based on the premise that the act of May 29, 1924, supra, authorized the levy of a gross production tax only and that any other tax levied by the States was unauthorized. Oklahoma ex rel. Oklahoma Tax Commission, et al. v. Barnsdall Refineries, Inc., et al., 296 U.S. 521, was relied on to support this position. There the Supreme Court had under consideration a much more limited assent by Congress to the taxation of the Indians' royalty interest. Congress had authorized the State of Oklahoma to levy a gross production tax on all oil

produced in Osage County, Oklahoma, and the Secretary of the Interior was authorized to pay such gross production tax in lieu of all other State and county taxes levied on the production of oil and gas as provided by the State law. The Secretary was also authorized to pay an additional sum of one percent of the amount received by the Osage Tribe of Indians as royalties from the production of oil and gas, such sum to be used by Osage County for the construction and maintenance of roads and bridges in the county.[11]

The State of Oklahoma thereafter enacted a law providing for a tax of one eighth of a cent per barrel on oil produced in the State. The question

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11 Section 5 of the Act of March 3, 1921 (41 Stat. 1249, 1250).

before the court was whether that tax, when applied to oil produced by lessees on lands of the Osage Tribe of Indians, was within the congressional consent. The court held:

> Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, * * *." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement

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> that the tax permitted was to be in lieu of all other taxes.
>
> * * * * * * * *
>
> The Supreme Court of Oklahoma emphasized the fact that the 1/8 of a cent per barrel tax, denominated by the statute an "excise," is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

That decision cannot be relied upon as authority for refusing to pay taxes levied by other States under the authorization contained in the act of May 29, 1924. There the tax authorized to be collected was named--a gross production tax--and was to be in lieu of

all other taxes. In the 1924 act neither of these limitations appears.

At the time the act of May 29, 1924, was under consideration by the House of Representatives the question was raised as to the situation with respect to taxation. The statement was made that since Congress had recently passed two acts requiring the Quapaw Indians[12] and the Osage Indians[13] to pay the gross production tax to the State it was thought only fair, inasmuch as that same kind of taxation was going to be extended, perhaps, into various States, that the gross production tax should go to the upbuilding of the State. The statement was also made that the bill

12 Section 26 of the act of March 3, 1921 (41 Stat. 1225, 1249).

13 Section 5 of the act of March 3, 1921 (41 Stat. 1249, 1250).

under consideration gave the State the same kind of tax as was given under the Osage act.[14] It is significant to note, however, that the wording of the two sections is materially different. The wording of the Quapaw act referred to in the debate is identical with the 1924 act. It must be assumed that had Congress intended to limit the right of the States to a tax on the gross production, in lieu of all other taxes, as was done in the Osage act, Congress would have chosen the words of that act rather than the broader words of the Quapaw act.

My conclusion is that the States of New Mexico and Montana, in seeking to impose the taxes under consideration, plainly come within the permission given

14 65 Cong. Rec. 6855 (1921).

by the act of May 29, 1924. This conclusion makes it unnecessary, of course, to decide whether such taxes could be validly assessed and collected by the States in the absence of congressional consent (compare Oklahoma Tax Commission v. United States, 319 U. S. 598).

Approved:

Oscar L. Chapman,

Assistant Secretary.

Opinion of the Department of Interior

M-36246, October 29, 1954,

"State Taxation of Tribal Royalty

Interests in Oil and Gas Leases on

Blackfeet Indian Reservation"

MEMORANDUM

TO: Commissioner of Indian Affairs

FROM: Solicitor

SUBJECT: Collection of Montana State tax on oil and gas royalty interests in the Blackfeet Tribe

There have been referred to this office for its consideration letters from your Billings Area Office, respecting the procedures for the collection of a net proceeds tax levied by the State of Montana against the oil and gas royalties due the Blackfeet Tribe from unallotted oil and gas produced by lessees on the Blackfeet Reservation. The authority of the State to levy such a tax has heretofore been considered and confirmed. British American Oil Producing Company v. Board of Equalization, 299 U.S. 159

(1936); Op. Sol. M-32093, September 20, 1943. The immediate question, therefore, relates not to the taxability of the tribal royalty interest but rather to the procedure by which the tax may be paid.

The applicable Montana statute relating to the procedure for the payment of these taxes states in part:

> "* * * The operator or producer shall be liable for the payment of said taxes, and same shall be payable by and shall be collected from such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest." Sec. 84-5409, Revised Codes of Montana, 1947, Annotated.

The Act of May 29, 1924 (25 U.S.C. 398), by which the Congress consented to

the taxability of such royalty interests, states in part that:

> "* * * the production of oil and gas and other minerals on such [unallotted] lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands * * *."

From the letters received from the Area Office, it appears that the problem of devising an administratively convenient procedure for the payment of the Montana tax is complicated by a past ruling of this Department that the 1924 Act requires the Secretary to pay the tax and does not permit oil and gas lessees, as contemplated by the quoted Montana statute, to pay the tax to the State and deduct the amount thereof from the

royalty payments made to the tribe. This ruling is contained in a letter dated March 20, 1945, addressed to the Superintendent of the Navajo Agency and signed by Mr. Walter V. Woehlke, for the Commissioner, and approved by then Assistant Secretary Chapman on April 3, 1945, which dealt with a New Mexico statute similar to the Montana statute and its application to the payment of taxes on the royalty interests of the Navajo tribe in its tribal oil and gas leases. In the course of that letter it was stated:

> "It is believed that your office should submit to the New Mexico Bureau of Revenue a statement based on information available from the records of the Geological Survey supervisory office, showing the amount of royalties received to the credit of the Navajo tribe during the current year, and that you should suggest to the Revenue Bureau that it submit

> to you a separate tax bill for each tax the State is levying against the Indian royalty interest, citing on each bill the State statutory provision pursuant to which the tax is being levied. Upon receipt of the tax bills they should be carefully examined by your office and by the Supervisor's office, and if found to be correctly computed and to cover the taxes referred to in the Solicitor's opinion, the bills may then be paid by your office. It might be advisable for you to point out to the New Mexico Bureau of Revenue that while such a procedure is apparently not the normal procedure for collection of the taxes on production from non-Indian lands, where the operators make deductions for taxes on landowner's royalty share, some variation is necessary with respect to restricted tribal lands inasmuch as the act of May 29, 1924 (43 Stat. 244, 25 U.S.C. sec. 398), and the Comptroller General's rulings of September 21, 1932, and November 9, 1932, A-44569, make it the function and duty of the Secretary of the Interior to pay such taxes as come within the authorization contained in the said act of May 29, 1924."

It appears from the records that for the past several years the procedure outlined in the letter of March 20, 1945 has not been pursued in the case of the Blackfeet Reservation because, pursuant to the provisions of the tribe's oil and gas leases, oil and gas royalties have been paid by lessees directly to the tribe and not to the Superintendent. Moreover, it is represented that the tribe has not promptly paid the taxes due with the consequence that various lessees are being billed by the State and are becoming apprehensive of their legal rights in the situation. In the circumstances, reexamination of the basis for the conclusion reached in 1945 that the Secretary of the Interior must pay such taxes seems warranted.

The rulings of the Comptroller General, upon which the 1945 conclusion is based, related to the procedures for the collection of an Oklahoma State tax of 3 per cent on the gross production of oil and gas from restricted Indian lands of the Five Civilized Tribes. The Comptroller General held that it was the obligation of the Indian Service to collect the royalties in full and to remit the taxes to the State rather than to direct the lessee to remit the taxes and deduct them from the royalties. The Comptroller General's rulings were specifically posited upon Section 3 of the Act of May 10, 1928. 45 Stat. 496, which provides in part:

> "* * * The Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and

> belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interests of the respective Indian owners of such oil, gas and other mineral production."

It is readily observed that the 1928 Act explicitly required the taxes to be paid out of specified funds in the custody of the Secretary. The Comptroller General's rulings in the case of the Five Civilized Tribes, therefore, would not seem to be controlling in the case of the 1924 Act, which merely authorizes and directs the Secretary to cause the tax to be paid without indicating in any way whatsoever the manner in which it is to be paid or the source of the funds to be used therefor. Indeed, under the 1924 statute, the Secretary would seem to have fulfilled the obligation imposed upon him by the Congress when, through suitable

arrangements, he causes the tax to be paid either by the tribe or by the lessees.

The Billings Area Office has suggested that, subject to various administrative controls, the lessees be asked to pay the tax directly to the State, to deduct the amount thus paid when remitting their royalty payments to the tribe, and to support the deduction with properly receipted tax bills. Such an arrangement, it seems to me, is permissible under the 1924 Act and would not impair the obligations under the lease contract between the lessees and the tribes. _Forbes v. Mid-Northern Oil Company_, 45 Pac. (2d) 673, 679.

J. REUEL ARMSTRONG,
Acting Solicitor.

Opinion of the Department of Interior,
M-36310, October 13, 1955
"Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana"

Memorandum

TO: Commissioner of Indian Affairs

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Oil and gas privilege and license tax, Fort Peck Reservation, under laws of Montana

You have referred to this Office for consideration a letter dated March 31, 1955, from your Area Director at Billings, Montana, accompanied by a Resolution by the Tribal Executive Board of the Indians of the Fort Peck Reservation opposing the payment of a privilege and license tax imposed by the State of Montana on the royalty interest of the Tribe in crude oil produced on the reservation.

Section 60.145, Volume 4, of the Revised Code of Montana (1947), providing for the assessment of the privilege and license tax, after stating the schedule of assessments, reads in part as follows:

> "Producers thereof shall make such payment on each and every barrel of crude petroleum and each ten thousand (10,000)

> cubic feet of natural gas produced for themselves as well as for others including royalty holders and shall be reimbursed for such payments made on crude oil and natural gas produced for others in the same manner as they are reimbursed for net proceeds tax paid on crude petroleum or natural gas produced for others as provided for in section 84-5409."

Section 84.5409 of the Code provides that operators or producers of oil shall be liable for the tax:

> "* * * provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interests, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interests."

An Act of Congress approved May 29, 1924 (43 Stat. 244; 25 U.S.C. 398), authorizes the Secretary of the Interior to approve oil and gas mining leases on unallotted land of Indians, other than

the Five Civilized Tribes and the Osage Reservation, and provides:

> "* * * the production of oil and gas and other minerals on such [unallotted] lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands* * *"

The provisions of the Act of May 29, 1924 are broad and all inclusive, authorizing the State to tax the production of oil and other minerals "in all respects the same as production on unrestricted lands." In an Opinion by the Solicitor of this Department rendered September 20, 1943 (58 ID 535-538), it was held that the Act embraces the Montana privilege and license tax. See also <u>British American Oil Production</u>

Company v. Board of Equalization, 299 U.S. 159 (1936). You are accordingly advised that the tax is assessable against the tribal royalty from oil and gas mining leases on the Fort Peck Indian Reservation.

(Sgd) W. H. FLANERY
Associate Solicitor, Indian Affairs

Opinion of the Department of Interior,
M-36345, May 4, 1956,
"State Production Taxes on Tribal
Royalties from Leases Other Than
Oil and Gas"

MEMORANDUM

TO: Regional Solicitor, Denver

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Payment of severance and conservation taxes from tribal royalties under leases of tribal lands in the State of New Mexico for the mining of uranium and minerals associated therewith

You have requested an opinion on whether the act of May 29, 1924 (43 Stat. 244; 25 U.S.C. 398) subjecting royalties from leases on unallotted tribal land to State production taxes, is applicable to production of minerals other than oil and gas.

The act of February 28, 1891 (26 Stat. 795; 25 U.S.C. 397) authorized the leasing of unallotted tribal land for mining purposes for a term of 10 years. The amendatory act of May 29, 1924 authorized oil and gas leases on such lands for a period of 10 years for so long thereafter as oil and gas is being produced in paying quantities, "Provided that * * * the production of oil and gas <u>and other minerals</u> on such lands may be taxed by the State in which such lands are located in all respects the same as production on unrestricted land * * *." (Italics supplied). Thus by specific language the act covers minerals other than oil and gas. The mere fact that the act of May 29, 1924, permitted a longer period of leasing for oil and gas purposes could not be the basis of an

implication that the taxation of production applied only to oil and gas leases. Nor has the general mineral leasing act of May 11, 1938 (25 U.S.C. 396a-f) affected the taxing power of the State under the 1924 act or under section 3 of the act of March 3, 1927 (44 Stat. 1347, 25 U.S.C. 398c) pertaining to the taxation of production from mineral leases on Executive Order Indian reservations. Only those matters which were inconsistent therewith were repealed by section 7 of the 1938 act. The primary purpose of this act, which is silent as to such taxes, was to obtain uniformity so far as practicable in the law relating to the leasing of unallotted tribal land for mining purposes on Indian reservations.

The States' taxation of production

under the two acts is contained in independent provisions, and not in provisos which would have been superseded along with their leasing provisions by the 1938 act. Although the taxing provisions of the 1924 act are preceded by the word "provided" that does not always mean that the proviso is inseparably connected with the general language to which it is attached. Among other things, provisos are often used to introduce a new subject matter. Quite clearly the proviso was so used in the 1924 act and consequently the taxing provisions of this act as well as the taxing provisions separately contained in section 3 of the 1927 act are in full force and effect.

(Sgd) W. H. FLANERY

Associate Solicitor, Indian Affairs

84 Interior Dec. 906 (1977)

"The Tax Status of the Production of Oil and Gas from Fort Peck Tribal Lands."

You have requested our opinion on whether or not the State of Montana has authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Production taxes have been levied by the State under the purported authority of the Act of May 29, 1924, 43 Stat. 244 (25 U.S.C. § 398 (1970)), and are being paid by the lessees prior to paying royalties to the Tribes. See Revised Codes of Montana, §§ 84-7006, 84-5401, 84-6205, 84-2202, 60-145. In

1966, the tax was determined applicable to oil and gas production from Fort Peck tribal lands by the Assistant Secretary and the Deputy Assistant Secretary, relying on legal advice from this office. See Attachments No. 1 and 2 hereto. After careful reconsideration, we have concluded that that earier determination is erroneous as a matter of law. Specifically, we hold that production of oil and gas on Fort Peck tribal lands--or lands of other tribes--from leases made under the Indian Mineral Leasing Act, May 11, 1938 (52 Stat. 347; 25 U.S.C. §§ 396a-396f (1970)) are not taxable by the state.[1]

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1 At the present time there are 82 active leases at Fort Peck, eight of which are producing oil, all of which were authorized under the 1938 Act. Prior to a lease being given, a sale is conducted under departmental regulations.

The Assistant Secretary's 1966 determination relied heavily on the Supreme Court's decision in British-American Oil Co. v. Board of Equalization, 299 U.S. 159 (1936). In British-American, a non-Indian mineral lessee on the Blackfeet Reservation sued to enjoin collection of state gross production and net proceeds taxes on its oil and gas revenues.[2] The Court held taxation of the non-Indian lessee was authorized by a 1924 statute (43 Stat.

(Footnote 1, continued) A notice of advertisement of the sale is made which cites the 1938 Act and the regulations published thereunder (25 CFR Part 171) as the authority for the leasing of tribal lands. Leases are then awarded to the bidder who offers the highest "money bonus on a tract basis."

2 The Tribe's interest was not argued before the Supreme Court.

244), 25 U.S.C. § 398 (1970).[3] This 1924 statute permits state taxation of the production of oil and gas and other minerals from lands leased under the

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3 This statute provides:

"Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under sec. 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is

earlier 1891 Indian mineral leasing statute, 25 U.S.C. § 397 (1970). Sec. 397 reads:

> Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Italics added.)

(Footnote 3, continued)
authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

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The Court in British-American opined that the Blackfeet lease was authorized by sec. 397; hence, taxation was authorized by the 1924 statute. The Court relied upon "uniform administrative practice" and "judicial decision" construing the "bought and paid for" language in sec. 397 "as not confined to lands acquired by Indians through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." 299 U.S. at 164.

We conclude that British-American is inapposite to production under the Fort Peck leases for a number of reasons. First, the question of whether sec. 397 authorized the lease was not the subject

of any dispute between the parties. The State agued [sic] that the statute applied; otherwise, the 1924 Act authorizing taxation could not have been relied upon. The lessee agreed that the statute applied; otherwise since there would be no other applicable Indian mineral leasing authority, its underlying lease would have been void. See 25 U.S.C. § 177 (1970). The Court's statements that the statute authorized the lease thus arose in this context. Moreover, the lease in issue in British-American specifically "recites that it was given in accordance with § 3 of the Act of Feb. 28, 1891, * * * as amended by [the] Act of May 29, 1924 * * *." The relationship of the 1938 Act to sec. 398 was not (nor could it have been) an issue. The decision is

not, then, authority for holding tribal royalties taxable, particularly when the lease is made under the 1938 Act, and not under the earlier 1891 statute.

It is understandable that, since it was for many years the only general mineral leasing authority covering tribal lands, the 1891 statute would have been broadly construed by the Court's dicta in 1936 and by the few administrative decisions of the Department preceding British-American.[4] However, in 1938, shortly after the decision, Congress enacted a new general and comprehensive Indian mineral leasing statute. 25 U.S.C. §§ 396a-396f (1970). The 1938 Act contains no explicit provision similar to

4 The two earliest Departmental decisions are expressions by the Assistant Attorneys General dated Jan. 11, 1892, and Nov. 17, 1897. The 1892

that in the 1924 Act authorizing the imposition of state taxes.

The failure to clearly state the relationships among the statutes creates an ambiguity with respect to whether the 1924 taxing authority was meant to be repealed by sec. 7 of the 1938 Act as inconsistent with the later Act. Since the 1938 Act made no provision for

(Footnote 4, continued) letter states that by using the "bought and paid for" language:

"* * * Congress was legislating with reference to those Indians who have, under treaty or otherwise, become possessors or owners of certain specific tracts or bodies of lands, by purchase, or exchange or surrender of other property in contradistinction to those Indians who are occupying reservations created by executive order or legislative enactment." * * * (Italics added.)

Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P. 348, 351 (1896).

taxation, even though it was intended to be a comprehensive scheme for mineral leasing of tribal land, that Act could reasonably be construed, given the rules for interpretation of statutes passed for the benefit of Indians (discussed infra), as having repealed the earlier taxing proviso. However, I do not believe such a conclusion is necessary here. Even if the 1924 taxing authority was not repealed as to leases entered into pursuant to the 1891 Act, it is far from clear that the 1938 Act intended to carry forward and incorporate the taxing authority into the general leasing scheme provided therein, resulting in a situation where leases entered into pursuant to the later Act would be subject to the earlier taxing authority. In fact, the clear intent of the 1938 Act

was to replace the earlier leasing statutes, not to complement or incorporate them. The 1938 statute, as noted, does not itself authorize state taxation, nor does it refer to the 1924 proviso. The failure of the 1938 Act to either clearly repeal or clearly adopt the earlier Act at most creates an ambiguity which necessarily calls into play the appropriate rules of statutory construction.

The 1897 decision (25 L.D. 408), involved the validity of a lease on the Uintah Reservation. It sets forth in some detail the history of that reservation, emphasizing the process by which tribes ceded other lands and agreed to move onto the reservation. Id. at 410-11. The opinion concludes that where tribal landr elsewhere are surrendered

in return for the creation of a reservation, the reservation lands are "bought and paid for" within the meaning of the 1891 Act.

The general rules for the construction of Indian statutes, particularly those in which a tax question is present, were recently summarized by the Supreme Court in Bryan v. Itasca County, Minnesota, 426 U.S. 373-392 (1976):

> * * * [I]n construing this "admittedly ambiguous" statute, Board of Com'rs v. Seber, 318 U.S. at 713, we must be guided by that "eminently sound and vital canon," Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). See Choate v. Trapp, 224 U.S. 665, 675 (1912); Antoine v. Washington, 420 U.S. 194, 199-200 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. McClanahan v. Arizona State Tax Comm'n, 411 U.S., at 174; Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Carpenter v. Shaw, 280 U.S. 363, 366-367 (1930). "This is so because * * * Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 613-614 (1943) (Murphy, J., dissenting).

In Bryan, the Supreme Court held that sec. 4(a) of Public Law 280 (codified at 28 U.S.C. § 1360 (1970)), because it is not a clear grant of power to the states to tax, did not terminate

the traditional Indian immunity from state taxation. 426 U.S. at 393.[5]

5 In Choate v. Trapp, 224 U.S. 665 (1912), the Supreme Court considered whether a statutory exemption of allotted reservation lands from state taxation was repealed by implication by a second statute which removed certain restrictions on alienation imposed by the first statute. The state officials who were parties to the case relied upon the general principle that tax exemptions should be narrowly construed. After conceding the general applicability of that doctrine, the Court held that as to:

> "* * * the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, * * *." 224 U.S. at 675.

Accord, McClanahan v. Arizona State Tax Commission supra.

If the 1938 Act incorporated the 1924 taxing proviso, it must have done so by implication,[6] for there is no express provision. Yet in Bryan, the Supreme Court declined to find a similar implied grant of taxing power in Public Law 280. Observing that Congress had enacted several termination statutes which were "cogent proof that Congress knew well how

6 An interpretation of the 1938 Act as incorporating the 1924 tax proviso would be especially repugnant in the case of those reservations and those minerals for which leasing authority was first created by the 1938 Act, and for which, therefore, no taxing authority previously existed, since as to these, a tax immunity would be terminated by implication. See, the transmittal letter of the Assistant Secretary of the Interior in H. Rep. 1872, 75th Cong., 1st Sess., 1938, describing the confused situation with respect to existing leasing authority and demonstrating that, in certain instances, no authority existed at all.

to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation," the Court concluded that "if Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so." 426 U.S. at 389-390. With respect to the 1938 leasing Act, the situation is exactly the same. Had Congress intended to include state taxing authority, it would have done so expressly. The fact that it had earlier done so, for leases issued under the 1891 Act, is clear evidence that it knew how to grant such authority to the states, had it so intended.

The 1938 Act was proposed by the Department. The Secretary's transmittal letter states that "* * * [o]ne of the purposes of the legislation now proposed, * * * is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes."[7] Prior to the 1938 Act, "the law governing leases on tribal land [was] in a patchwork state."[8] The 1938 legislation was intended as a

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7 Letter of June 17, 1937, from Acting Secretary Charles West to the Speaker of the House of Representatives, H. Rep. No. 1872, 75th Cong., 2d Sess., also quoted in F. S. Cohen, Handbook of Federal Indian Law, p. 328, n. 468 (G.P.O. 1940 Ed.).

8 Cohen, supra, Ftn. 4 at p. 328. The law prior to 1938 was described in the Secretary's transmittal letter proposing the legislation as follows: "Under sec. 26 of the Act of June 30, 1919 (41 Stat. 31), as amended,

"comprehensive law covering mineral leases on unallotted land. * * *"[9] The

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(Footnote 9, continued) leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 785), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Sec. 16 of the Indian Reorganization Act, approved June 18, 1934 (48 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under sec. 17 of that act Indian tribes to which charters of incorporation issued are empowered to lease their lands for periods of not more than ten years. There is at present no law under which Executive order lands may be leased for mining outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under secs. 16 and 17 of the Indian Reorganization Act. * * *"

9 Ibid.

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Act authorized leasing of all "unallotted lands within any Indian reservation * * * by authority of the tribal council or other authorized spokesmen for such Indians." 25 U.S.C. § 396a (1970). The comprehensive procedures in the Act provide for public auctions of oil and gas leases, the rejection of all bids and readvertisement if it is in the interests of the Indians (25 U.S.C. § 396b (1970)), and impose bonding requirements on lessees of tribal land (25 U.S.C. § 396c (1970)). The 1938 Act refers to the Indian Reorganization Act (48 Stat. 987) which permits Indian tribes organized and incorporated under secs. 16 and 17 of the IRA to lease lands for mining purposes in accordance with the provisions of any tribal constitution and charter. See 25

U.S.C. §§ 476, 477 (1970).

It is clear that states cannot tax trust property, reservation Indians, or Indian tribes unless Congress has consented;[10] and it is likewise well-established that statutes diminishing Indian tax exemptions are strictly construed.[11] Accordingly, we attach considerable significance to the fact that Congress did not provide in the

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10 Bryan v. Itasca County, supra; Confederated Salish and Kootenai Tribes v. Moe, 48 LEd2d 96 (1976); McClanahan v. Arizona State Tax Commission, supra; Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); British-American Co. v. Board, supra, at p. 16.

11 See Choate v. Trapp, supra, at Ftn. 5.

1938 Act that tribal royalties received under that statute were to be subject to state taxation. We conclude accordingly that royalties received from leases executed under authority of the 1938 statute are not subject to the proviso in 25 U.S.C. § 398 (1970). Only if a lease is entered into under the 1891 statute would the proviso consenting to taxation be applicable. The Bureau should administer its leases accordingly.

This interpretation of the 1891 Act, the 1924 amendment and the 1938 Act is consistent with present Congressional policy on Indians. Both the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit recently have stated that when interpreting Indian statutes you must take into consideration the present Congressional policy on Indians.

Bryan, supra, at p. 15, ftn 14; Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). That Congressional policy is one of "fostering Indian autonomy, reservation self-government and economic self-development." Santa Rosa, supra. Our reading of the 1938 Act is not only consistent with and an implementation of this policy, but is also consistent with Congress' Indian policy when the 1938 Act was enacted into law. See Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970). As Felix Cohen stated in his Handbook of Federal Indian Law, supra, p. 126, the Indian Reorganization Act,

> * * * by affording statutory recognition of * * * [tribal] powers of local self-government and administrative assistance

> in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. (Footnote omitted.)

Our conclusion may to some extent depart from earlier decisions of the office. Solicitor Harper held that the 1924 Act authorized New Mexico and Montana to levy various taxes on mineral royalties received by the Blackfeet and Ute Mountain Tribes, relying almost entirely on British-American, supra. 58 I.D. 535 (1943). Although that opinion postdates the 1938 statute, the leases in question had been "executed pursuant to * * * the Act of Feb. 28, 1891." 58 I.D. at 536. Under the circumstances, Solicitor Harper had no occasion to

consider the impact of the 1938 Act on his conclusion. While we do not believe our decision directly conflicts with Solicitor Harper's--since on the facts before him, British-American, clearly controls--this opinion would supersede that one as to leases executed under the 1938 Act. In 1956, Associate Solicitor Flannery issued an opinion which held, among other things, that the 1938 Act did not affect the taxing power of the State of New Mexico under the 1924 Act. Memorandum, May 4, 1956, M-36345, entitled "State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas." One year earlier, Associate Solicitor Flannery concluded that the Fort Peck Tribes' royalties may be taxed under the 1924 Act. Memorandum, Oct. 13, 1955, M-36310, entitled "Oil

and Gas Privilege and License Tax, Fort Peck Reservation, Under Laws of Montana." These decisions by Associate Solicitor Flannery are hereby reversed.

While our reading of the 1938 Act disposes of the question, we also conclude that the 1891 statute--25 U.S.C. § 397 (1970)--does not in any event cover tribal lands at Fort Peck. Those lands are not, in our view, "bought and paid for" within the meaning of that section. The dicta in British-American did not limit the interpretation of the "bought and paid for" clause in the 1891 statute "to lands acquired by Indians through the payment of a consideration in money" but also found it to include "lands reserved for Indians in return for a cession or surrender by them of other lands,

possession or rights."[12] Whether or not the Blackfeet lands were "bought and paid for" in British-American was dictum since the parties had stipulated to the applicability of the 1924 Act. The petitioner did not "question that the reservation as existing and occupied by the tribe in recent years comes within the terms of the proviso in the Act of 1891 as lands which the Indians have bought and paid for." The history of

12 The only other judicial decision construing the statute holds that the statute is satisfied "either by the payment of money, or exchange or surrender of the possession of other property." Strawberry Valley Cattle Co. v. Chipman, supra. In Strawberry, the Supreme Court of Utah held that the lands of the Uintah and White River Utes "were bought and paid for" (they surrendered the possession of other property). The Cherokee Indians are an example of another tribe which "bought and paid for" lands when they surrendered their lands east of the Mississippi to settle on lands west of Arkansas.

the Blackfeet Reservation shows that the Tribe's original territory, described in an 1855 treaty,[13] was set apart for them as a reservation by subsequent executive orders and Acts of Congress.[14] On May 1, 1888 (25 Stat. 113), Congress ratified agreements between the United States and

13 The Blackfeet Reservation was established pursuant to the treaty of Oct. 17, 1855, 11 Stat. 657. This treaty agrees to a particular territory as Blackfeet country (Art. 4), permits other tribes to have common hunting rights in that territory (Art. 3), agrees to passage of United States settlers through the territory, and to the establishment of roads, telegraph lines and military posts (Arts. 7 and 8).

14 "Under executive orders of 1873 and 1874, an Act of Congress of Apr. 15, 1874, c. 96, 18 Stat. 28, and executive orders of 1875 and 1880, the Blackfeet and certain of the other Indians associated with them came to occupy a large part of this original territory as a reservation specially set apart for them." British-American, at p. 162.

the Assiniboine, Sioux, Gros Ventre and Blackfeet Tribes in which the four tribes ceded the 1874 Act reservation to the United States except for three smaller reservations retained by the Tribes. The three reservations are Blackfeet, Fort Peck and Fort Belknap. Each of the Tribes, by various agreements as ratified by the 1888 Act, disclaimed any interest in the reservations set aside for other tribes (e.g., the Blackfeet Tribe disclaimed any interest in the Fort Peck and Fort Belknap Reservations, which between 1874 and 1888 had been the common property of all four tribes). By another agreement ratified on June 10, 1896 (29 Stat. 321, 353), part of the separate Blackfeet Reservation was ceded to the United States, and the remainder was set apart as the Tribe's future home. The

present Blackfeet Reservation was created as a result of the 1896 agreement, in which the Tribe ceded to the United States part of the separate reservation created for it in 1888, while retaining the remaining land as its reservation. The Court focused on this transaction in British-American.

There are a number of distinctions between Blackfeet and Fort Peck. The 1855 Treaty recognized Blackfeet title to aboriginal lands. Under later agreements and statutes, like the one in 1896, the Blackfeet retained some of their aboriginal lands but ceded other parts of these lands to the United States. By contrast, the Fort Peck Reservation was created by a grant of lands to the Tribes from the United States. It was initially

set aside by executive order,[15] confirmed by statute,[16] creating a single reservation of about 20 million acres for the "Gros Ventre, Piegan, Blood, Blackfeet, River Crow and other Indians."[17] The present reservation was separated from two other reservations--Blackfeet and Fort Belknap--by the Act of May 1, 1888, supra (which followed agreements with the Tribes that had interests in the larger reservation). But title had vested in the Tribes by virtue of eariler [sic] grants and not as a process of their surrender and cession of other lands. That is, as applied to

15 Executive Order of July 5, 1873, 1 Kapp. 855.

16 Act of Apr. 15, 1874, 18 Stat. 28.

17 "Other Indians" included the Assiniboine and Sioux Tribes. United States v. Assiniboine Tribes of Indians, 192 Ct. Cl. 679, 688-90, 428 F.2d 1324, 1328-30 (1970).

the Fort Peck Tribes, their reservation was not created out of lands reserved for them in return for their cession or surrender of other lands; the Assiniboine and Sioux Tribes did not buy these lands, they already owned them.[18]

Our review of prior interpretations of this "bought and paid for" provision has convinced us that its construction has not been altogether consistent. The requirement of an exchange, surrender and cession in British-American is not invariantly followed. For example, an 1892 letter by the Assistant Attorney General shortly after the 1891 Act[19]

18 Notably, Congress in 1922 enacted a special authority for leasing unallotted surplus lands at Fort Peck. 25 U.S.C. § 400 (1970).

19 Supra, Ftn. 3.

distinguishes treaty reservations from those established by "executive order or legislative enactment." Similarly, the Acting Secretary's 1937 letter transmitting the comprehensive mineral leasing proposal that became the 1938 Act states that the 1891 statute pertains only to "treaty reservations."[20] Of

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20 The 1891 Act has historically been held inapplicable to executive order Indian reservations by the Department. 25 L.D. 408 (1897); 49 L.D. 139, 142 (1922). The reason for this, in part, was doubt as to whether these lands were public lands (in which case the United States would be entitled to lease revenues) or Indian trust lands (in which case the tribes would be entitled to the revenues). In 1919, Congress authorized some mineral leasing excluding oil and gas on executive order reservations in certain states, 25 U.S.C. § 399 (1970), and enacted the Mineral Leasing Act for public lands the following year. Attorney General Harlan Fiske Stone determined that executive order Indian reservation lands could not be leased as public lands, 34 Op. A.G. 171 (1924), and Congress by a 1927 Act provided for oil and gas leasing on all executive order reservations, 25 U.S.C. § 398a (1970).

course, if "bought and paid for" is so read, Fort Peck is also excluded, for it is not a treaty reservation.

From our research, however, we have been unable to discover a precise or consistent reading of "bought and paid for." However, the Supreme Court in British-American, supra, might have reasonably construed that clause to mean those lands actually purchased by Indians in a commercial setting. See Footnote 12, supra. The language is not a recognized term of art in Indian law. It was inserted into the Act in 1891 by the Conference Committee.[21] Prior to the

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(Footnote 20, continued) It was not until the 1938 Act that mineral leases for other than oil and gas could be made on executive order reservations outside the states covered by the 1919 Act.

21 21 Cong. Globe 3118 (1891).

proviso's insertion, the bill would have covered all "Indian lands not needed for allotment, and not suitable for agriculture or farming, and [which would] not sell to the advantage of the Indians." Accordingly, some constriction must have been intended, but the Conference Report provides no edification of the Committee's intent. Nor is it apparent why Congress wished to distinguish for leasing purposes lands that had been "bought and paid for" from other unallotted tribal lands. Since virtually all present Indian mineral leasing is under the 1938 Act, it is unnecessary for this office to reconcile these somewhat conflicting readings of the "bought and paid for" language, or to determine on a reservation-by-reservation basis whether

particular lands were "bought and paid for."

It is, accordingly, my conclusion that the State of Montana is without authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands on the Fort Peck Reservation.

LEO KRULITZ.

<u>Oct. 27, 1966</u>

Dear Mr. Sonosky:

On Mar. 16, 1965, you filed an appeal as attorney for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana from a decision by the Deputy Commissioner of Indian Affairs

dated Feb. 25, 1965, affirming the applicability of the Montana tax on oil and gas production to oil and gas produced from leased Fort Peck tribal lands and authorizing tribal oil and gas lessees to pay directly to the State of Montana future taxes due on tribal royalty interests.

Your appeal is based on two assertions: first, that the Congress did not authorize State taxation of the tribal lands in question, and second, that the Montana tax violates both the Enabling Act under which Montana was admitted into the Union and the Montana Constitution, both of which provide that, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *."

More specifically, you first contend that Congress has not authorized State taxation here since the Act of May 29, 1924 (43 Stat. 244; 25 U.S.C. § 398 [1970]), authorizes taxes only on lands leasable under sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 795; 25 U.S.C. § 397 [1970]). "Lands leasable under the 1891 Act are lands occupied by Indians who have bought and paid for the same." You claim that the lands of Fort Peck Reservation are not within the scope of the 1891 Act since they are not "bought and paid for."

The Fort Peck Reservation was created by an agreement ratified by Congress May 1, 1888 (25 Stat. 113). This agreement created the Fort Peck, Fort Belknap, and Blackfeet Reservations in return for which the Indians ceded to

the United States much of the land within an earlier reservation. The applicability of the Act of May 29, 1924 (43 Stat. 224; 25 U.S.C. § 398 [1970]), to the Blackfeet Reservation was considered in <u>British-American Oil Producing Co. v. Board of Equalization of Montana</u>, 299 U.S. 159 (1936). In that case, the Court recognized that the Blackfeet Reservation fell within the term of lands "bought and paid for" by the Indians, stating at p. 164:

"* * * by uniform administrative practice and by judicial decision this part of the proviso has been construed as not confined to lands acquired through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands,

possessions or rights, and citing 25 L.D. 408 and <u>Strawberry Valley Cattle Co. v. Chipman</u>, 13 Utah 454, 45 Pac. 348 (1896)."

The Fort Peck tribal oil and gas leases were approved under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. § 396 a-f) [1970]). This act is silent concerning taxation of the royalty interest but there is nothing inconsistent with the broad measure of the 1924 Act permitting State taxation. Sec. 7 of the 1938 Act repeals only those acts inconsistent with the 1938 Act. In an unpublished Opinion of the Solicitor, M-36310 (Oct. 13, 1955), it was decided that the Montana tax was assessable against royalties accruing from oil production on Fort Peck Reservation tribal land. After thorough consideration

in the Solicitor's Office, nothing in this appeal has been found which indicates error in the 1955 opinion.

Finally, we come to the contention that Montana's tax violates the Enabling Act of Feb. 22, 1889 (25 Stat. 676), and Ordinance No. 1, Constitution of the State of Montana, both of which provide that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The Montana Supreme Court, in British American Oil Producing Co. v. Board of Equalization of Montana, 101 Mont. 293, 54 P.2d 129, affirmed, 299 U.S. 159 (1936), rehearing denied, 299 U.S. 624 (1937), considered this issue, which was raised by the Blackfeet Tribe, and held that neither the Enabling Act nor the

Montana Constitution prevented the imposition of the royalty interest tax. As recently as 1961 the Supreme Court had occasion in Kake Village v. Egan, 369 U.S. 60 [1962], to examine similar disclaimer language in Alaska's Enabling Act. There the Court quite clearly indicated that such disclaimers by the States are of proprietary rather than of governmental interests. We, therefore, cannot agree that Montana is prohibited either by its Enabling Act or constitution from taxing the tribal royalty interest.

For the reasons stated, we concur in the decision of the Deputy Commissioner and, accordingly, dismiss the Tribes' appeal.

Sincerely yours,

HARRY R. ANDERSON,

Acting Secretary of the Interior.

Dec. 2, 1966

Dear Mr. Sonosky:

Your letter of Nov. 4, 1966 to the Secretary of the Interior petitions for reconsideration of the decision of Oct. 27, 1966, rendered by the Assistant Secretary which affirmed a decision dated Feb. 25, 1965 of the Deputy Commissioner of Indian Affairs, which held applicable to oil and gas produced from the tribal lands on the Fort Peck Indian Reservation the Montana production tax and authorized lessees to pay such taxes directly to the State. You assert, as you did in your original appeal, that the Fort Peck Reservation is not land "occupied by Indians who bought and paid for the same" within the meaning of the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 and

that, therefore, oil and gas produced from these lands is not subject to state taxation under the Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 [1970].

The Fort Peck Reservation was established by an agreement approved by the Act of May 1, 1888 (25 Stat. 113, 1 Kappler 261). That agreement created separate Fort Peck, Fort Belknap, and Blackfeet Reservation from a much larger area which had been reserved in 1874 for certain tribes in common. The Act of May 1, 1888, created three separate and distinct reservations and set them apart respectively for 1) a band of the Assiniboine Tribe and the Sioux Tribe (Fort Peck), 2) another band of the Assiniboine Tribe and the Gros Ventre Tribe (Fort Belknap) and, 3) the Blackfeet Nation (Blackfeet). While it is true that the tribes did receive monetary

considerations for the cessions and reliquishments [sic] which they made under this agreement, we are convinced that the agreement cannot be construed as meaning that these considerations were exclusive. In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Court characterized the agreement as entailing "various considerations moving from the Blackfeet to the United States and the reverse, and from the Blackfeet to their associates and the reverse." Op. cit. p. 162. In this respect, the situation of the Fort Peck Indians is in no wise different from that of the Blackfeet. We are convinced that the setting apart and the confirmation of separate reservations for the exclusive use of particular tribes must be regarded as partial consideration for what each surrendered.

But even if it could be said that the reservations established by the agreement and Act of 1888 were in no part quid pro quos for what the Indians gave up, still it is probable that the lands of their respective reservations would be considered "bought and paid for" within the meaning of the Act of 1891. In 10 Op. A.A.G. 122, cited in 25 L.D. 408, 412 [1897], the Assistant Attorney General observes:

"It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, hold said lands as purchasers having paid for the same, in the sense in which the words 'have paid for the same' are used in the Act of 1891."

In this view, the words "bought and paid for" are merely intended to distinguish lands in which Indians have a compensable property right under the Constitution from those, such as unconfirmed executive order reservations, in which they do not. Cf. Sioux Tribe v. United States, 316 U.S. 317 (1942); Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1948); Healing v. Jones, 174 F. Supp. 211, 216; 210 F. Supp. 125, 138 (1962).

Your next contention is that the case of British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), does not support the holding of the Assistant Secretary because British-American conceded that the Blackfeet Reservation had been "bought and paid for" as, you assert, it was required to do to sustain the validity of its lease.

It appears from the opinion that British-American was not relying upon the Act of 1891 as authority for issuance of the lease under which it claimed but, on the contrary, was contending that its lease should be deemed to have been granted under special acts relating to the Blackfeet Tribe. In any event, the Court states that the reason for the concession was doubtless that the petitioner recognized that by uniform administrative practice and by judicial decision the "bought and paid for" provision of the 1891 Act had been construed as not confined to lands acquired by Indians by the payment of monetary consideration, but equally to lands reserved for Indians in return for a cession or surrender by them of possessions or rights. We think it clear

that the Court gave explicit approval to the application of the "bought and paid for" provision of the 1891 Act to the Blackfeet Indian Reservation which, as noted, was established under the 1888 Act in the same manner as the Fort Peck Reservation.

Finally, you contend that the question whether the State tax is compatible with the State constitution was not addressed in the British-American case. You submit that the Blackfeet Tribe was not involved in that litigation and that the issue could not have been authoritatively disposed in its absence. While it does not appear that the Tribe participated in case in the Supreme Court of the United States, there can be no doubt that it participated below. The State Supreme Court's opinion, 54 P.2d

129 [1936], states that the Blackfeet Tribe filed a complaint in intervention (Ibid. at p. 129), and contains the following:

> "It is urged most strenuously by counsel on behalf of the tribe that the taxing of royalties, if permitted to stand, is in violation of the treaties and agreements between the Indians and the United States and also in violation of our State Constitution." (Ibid. at p. 133.)

It is obvious from a reading of the opinion that the issue of State power was raised in the case by the Blackfeet Tribe and was not developed, as suggested by your letter, solely as an issued [sic] between the State and British-American.

Your arguments have not persuaded us that the conclusion reached in the decision of Oct. 27, 1966--that the land in question was "bought and paid for" within the meaning of the Act of Feb. 28,

1891 (26 Stat. 795, 25 U.S.C. § 397 [1970])--is erroneous. The petition for reconsideration is hereby denied.

Sincerely yours,

ROBERT E. VAUGHAN

Deputy Assistant Secretary of the Interior.

Opinion of the Department of Interior, M-36896 (Supp.), March 2, 1979, "Tax Status of the Production of Oil and Gas from Jicarilla Apache Tribal Lands Under the 1938 Indian Mineral Leasing Act"

TO: ASSISTANT SECRETARY--INDIAN AFFAIRS

FROM: SOLICITOR

SUBJECT: TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM JICARILLA APACHE TRIBAL LANDS.

I advised you by a Nov. 7, 1977, opinion (M-36896, 84 I.D. 905 (1977)), that tribal royalties from production of oil and gas on Fort Peck tribal lands under leases made pursuant to the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 25 U.S.C. §§ 396a-396f (1970), are not taxable by the State of Montana. You have now requested my opinion as to whether a like conclusion is applicable to tribal royalties from leases of Jicarilla Apache tribal lands, with respect to taxation by the State of New Mexico.

The State of Montana asserted authority to levy taxes on production from the Fort Peck lands under purported sanction of 25 U.S.C. § 398 (1970) (Act of May 29, 1924, 43 Stat. 244); which had authorized taxation of production from tribal lands leased under 25 U.S.C. § 397 (1970) (Act of Feb. 28, 1891, 26 Stat. 795), that is, "bought and paid for" tribal lands. I concluded that the 1938 Leasing Act, which contained a comprehensive mineral leasing scheme but which did not contain a provision authorizing state taxation of production, did not incorporate the express taxing provision in the 1924 Act (25 U.S.C. § 398), and that therefore § 398 did not authorize taxation of royalties from production under leases made pursuant to the 1938 Act. I also noted in that opinion that there is no other statute

which might grant authority for state taxation of Indian royalties from such leases.

The Jicarilla Apache Reservation is distinguishable from Fort Peck in that it is an Executive Order reservation, and New Mexico taxes production of oil and gas thereon under purported authority of 25 U.S.C. § 398c. That section, worded similarly to the taxing proviso in § 398, was part of the Act of Mar. 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e, which authorized mineral leasing on Executive Order reservations. Both that Act and its legislative history made clear that Congress intended the leasing authority for tribal lands on Executive Order reservations and the policy of permitting the states to tax production thereon to be the same as that applicable to

"bought and paid for" reservations.[1]

As discussed in the Nov. 1977, opinion, the 1938 Act replaced the earlier fractionated leasing authorities (including §§ 398a-398e) with a comprehensive and uniform scheme for all reservations with a few specific exceptions.[2] Sec. 398c cannot be distinguished from § 398 in this regard. Both were enacted prior to the 1938 Act, and the effect of the 1938 Act was the same on both. Thus, if the taxing proviso in § 398 was not incorporated into the 1938 Act, as I earlier concluded, neither was the taxing proviso in § 398c. Accordingly, it is my conclusion that taxation of production on

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1 See, e.g., S. Rep. 1240, 69th Cong. 2nd Sess. (1927); S. Rep. 768, 69th Cong. 1st Sess. (1926).

2 The specific exceptions are named in § 6 of the 1938 Act, 25 U.S.C. § 396f.

Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. Absent specific statutory permission, New Mexico lacks authority to tax Indian property. (Solicitor's Opinion, M-36896 at 84 I.D. 10 (1977)). Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases.

LEO KRULITZ,

Solicitor.

APPENDIX I

S. REP. NO. 546

68TH CONG., 1ST SESS. (1924)

May 14, (calendar day, May 15), 1924--

Ordered to be printed

Mr. Harreld, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany H. R. 6298]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 6298) to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian Reservations affected by the proviso to section 3 of the act of February 28, 1891, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are set forth in House Report No. 386, Sixty-eighth Congress, which is appended hereto and made a part of this report.

There is also attached a letter from the Acting Secretary of the Interior, under date of May 10, 1924.

[House Report No. 386, Sixty-eighth Congress, first session]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 6298) to permit the leasing of unallotted lands of Indians for oil and gas purposes for a stated term and as long thereafter as oil or gas is found in paying quantities, and for other purposes, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Strike out all after the enacting clause and insert the following:

"That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation, subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities:

Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

Amend the title to read:

"A bill to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the act of February 28, 1891."

This legislation meets the approval of the Department of the Interior, as is

evidenced by the letter from the Secretary of the Interior which is attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,

Washington, March 22, 1924.

HON. HOMER P. SNYDER,

Chairman Committee on Indian Affairs,

House of Representatives.

MY DEAR MR. SNYDER: I have your letter of March 13, 1924, asking whether this department will approve the proposed amendment to the redraft of H. R. 6298, providing that the production of oil and gas and other minerals on restricted unallotted Indian lands may be taxed by the State in which the lands are located in all respects the same as production on unrestricted land.

This department realizes that the State should at least be permitted to tax

the lessees' interest in any production of minerals on restricted unallotted Indian lands and will offer no objection to including a tax on the royalty belonging to the Indians under the conditions named in the proposed amendment.

Very truly yours,

HUBERT WORK.

DEPARTMENT OF THE INTERIOR,

Washington, February 25, 1924.

HON. H. P. SNYDER,

Chairman Committee on Indian Affairs,

House of Representatives.

MY DEAR MR. SNYDER: I have your request for a report on H. R. 6298, a bill to permit the leasing of unallotted Indian land for oil and gas mining purposes for the time therein stated.

Unallotted Indian lands are subject to lease under the proviso of section 3 of the act of February 28, 1891 (26 Stat. L. 795), for mining purposes for a period of 10 years and it is believed that legislation should be enacted whereby oil and gas leases of such lands may be continued for so long as there is production in paying quantities.

In order to accomplish this I have redrafted the proposed bill, making it applicable to oil and gas mining leases on unallotted lands falling under section 3 of the act of February 28, 1891, and recommend that such legislation receive favorable consideration.

Very truly yours,

HUBERT WORK.

DEPARTMENT OF THE INTERIOR,

Washington, May 10, 1924.

HON. JOHN W. HARRELD,

Chairman Committee on Indian Affairs,

United States Senate.

MY DEAR MR. HARRELD: I have your letter of April 28, 1924, requesting an opinion on H. R. 6298, a bill to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the act of February 28, 1891 (26 Stat. L. 795).

The proviso to section 3 of the act cited authorizes the leasing of unallotted Indian lands for mining purposes for a period not to exceed 10 years, and it is believed that oil and gas leases should be continued for as long as there is paying production, as provided by H. R. 6298.

The form of the bill is the same as that on which a favorable report was made to the House committee, except that in lines 3 and 4 the words "other than lands of the Five Civilized Tribes and the Osage Nation," and in line 8 the words "public auction" have been added, and the bill also contains an additional provision permitting the State to tax the production of minerals including the royalty interest of the Indians.

To avoid any question arising as to the applicability of the bill to lands of the Five Civilized Tribes and the Osage Nation, the insertion therein of the words excluding such lands from its operation appears prudent, and as the department is following the policy of letting oil and gas leases on unallotted lands at public auction, no objection is seen to prescribing that method by law.

It is realized that the State should at least be permitted to tax the lessees' interest in any production of minerals on restricted unallotted Indian lands, and this department will offer no objection to including a tax on the royalty belonging to the Indians under the conditions named in the bill.

Favorable consideration of the proposed legislation is recommended.

Very truly yours,

E. C. FINNEY, Acting Secretary.

S. REP. NO. 614

74TH CONG., 1ST SESS. (1935)

Mr. Thomas of Oklahoma, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 2638]

The Committee on Indian Affairs, to whom was referred the bill (S. 2638) to amend the law governing the leasing of unallotted Indian lands for mining purposes, having considered the same, report thereon with a recommendation that it do pass without amendment.

This bill was introduced at the request of the Secretary of the Interior as set forth in his letter of April 15, 1935, a copy of which is appended hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,

Washington, April 15, 1935.

HON. ELMER THOMAS,

Chairman Committee on Indian Affairs,

United States Senate.

MY DEAR MR. CHAIRMAN: I transmit herewith a proposed bill to govern the leasing of unallotted Indian lands for mining purposes.

Under section 26 of the act of June 30, 1919 (41 Stat. 31), as amended, leases may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 25, 1891 (25 Stat. 795), as amended May 29, 1934 (43 Stat. 244), leases may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian

Reorganization Act, approved June 18, 1934 (48 Stat. 954), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation may be issued will be empowered to lease their lands for periods of not more than 10 years. There is at present no law under which Executive order lands may be leased outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the provisions of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The act of June 30, 1919, requires the formal opening of lands for prospecting, location, and lease, by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws, file formal location notice; and, under the regulations, he must have the lands surveyed if they have not already been surveyed, all in accordance with the mining laws applicable to the public domain. This frequently results in long delay and is often quite an expense to an applicant for a lease. Frequently, we have requests for leases for the purpose of removing sand and gravel for road-grading purposes, or for the quarrying of stone, either for building

or grading purposes in connection with which there would be but little under-surface workings. In such a case the applicant for a lease is required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than he cares to undertake, although the material he desires may be very conveniently located and could be profitably utilized and, consequently, the opportunity to lease the land is lost, and the revenue, while perhaps not a great deal in a particular instance, would amount to considerable in such cases throughout the entire Service.

Section 26 of the act of June 30, 1919, supra, as amended by the acts of March 3, 1921 (41 Stat. 1231) and December 16, 1926 (44 Stat. 922-925),

places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of the Interior has no discretion under the said section in the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder; and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands. In other words, under that law, neither this Department nor the Indian Tribal Council is in a position to prevent the acquisition of a lease after

the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey

markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change is in the interest of leasing deposits of building stone, sand, gravel, coal, and many other minerals. For instance, the well-known iron deposit on the Fort Apache Indian Reservation, outcropping along the canyon wall for a distance of about 2 miles, and 20 feet thick, with an estimated ore reserve of over 15,000,000 tons, now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of iron ore back from the face

of the cliff. This deposit, it is believed, should be leased to the highest bidder at public auction and in definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease through tying up the land with a long strip 600 feet wide. This deposit of iron ore is about 30 miles from a railroad, and any concern considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act which has very limited applications. The presence of coal is

usually known by geological association, and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake, Nev., can be seen for a distance of many miles, yet they must be "discovered" and "located" in accordance with the provisions of law relating to placer-mining claims and leased to the person who erects monuments thereon. Deposits of sand, gravel, and building stone are now similarly leased, even though the deposits are well known and could be leased to greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of unallotted Indian lands for general mining purposes. It will effect no change in the present law

for leasing oil and gas lands and will bring all mineral leas[illegible] matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

The Acting Director of the Bureau of the Budget has advised by letter of April 5 that the proposed legislation would not be in conflict with the financial program of the President.

Sincerely yours,

T.A. WALTERS,

Acting Secretary of the Interior.

S. REP. NO. 985

75TH CONG., 1ST SESS. (1937)

July 22 (calendar day, July 28), 1937

Ordered to be printed

Mr. Thomas of Oklahoma, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 2689]

The Committee on Indian Affairs, to whom was referred the bill (S. 2689) to regulate the leasing of certain Indian lands for mining purposes, having considered the same, report thereon with the recommendation that it do pass without amendment.

The proposed legislation was suggested by the Secretary of the Interior in a communication dated June 17, 1937, addressed to the President of

the Senate, who referred the same to your committee for consideration; thereafter, your committee authorized the introduction of a bill (S. 2689) for the purpose of carrying out the wishes of the Secretary of the Interior, and thereupon said bill (S. 2689) was referred to your committee for further consideration.

The communication of the Secretary of the Interior, dated July 17, 1937, above referred to, is attached hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,

Washington, June 17, 1937.

THE PRESIDENT OF THE SENATE.

MY DEAR MR. PRESIDENT: I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

Under section 26 of the act of June 30, 1919 (41 Stat. 31), as amended,

leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 28, 1891 (26 Stat. 785), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas, and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian Reorganization Act, approved June 18, 1934 (46 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years. There is at present no

law under which Executive-order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The act of June 30, 1919 requires the formal opening of lands for prospecting, location, and lease, by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws,

file formal location notice; and under the regulations he must have the lands surveyed if they have not already been surveyed, all in accordance with the mining laws applicable to the public domain. This frequently results in long delay and is often quite an expense to an applicant for a lease. Frequently we have requests for leases for the purpose of removing sand and gravel for road-grading purposes, or for the quarrying of stone, either for building or grading purposes in connection with which there would be little or no under-surface workings. In such cases, applicants for leases are required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than they care to

undertake although the material desired may be very conveniently located and could be profitably utilized; and consequently the opportunity to lease the land is lost and the revenue, while perhaps not a great deal in a particular instance would amount to considerable in such cases through the entire Indian Service.

Section 26 of the act of June 30, 1919, supra, as amended by the acts of March 3, 1921 (41 Stat. 1231), and December 16, 1926 (44 Stat. 922-923), places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of

the Interior has no discretion under the said section in the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder; and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands. In other words, under that law, neither this Department nor the Indian Tribal Council is in a position to prevent the acquisition of a lease after the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating

and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change is in the interest of leasing deposits of building

stone, sand, gravel, and metalliferous minerals. For instance, the well-known iron deposit on the Fort Apache Indian Reservation, outcropping along the canyon wall for a distance of about 2 miles and 20 feet thick, with an estimated ore reserve of over 15 million tons, now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of iron ore back from the face of the cliff. This deposit, it is believed, could be leased to better advantage at public auction and in definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease, through tieing up the land with a long strip 600 feet wide. This deposit

of iron ore is about 30 miles from a railroad, and anyone interested and considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act, which has very limited application. The presence of coal is usually known by geological association, and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake, Nev., can be seen for a distance of many miles, yet they must be "discovered" and

"located" in accordance with the provisions of law relating to placer mining claims and leased to the person who erects monuments thereon. Deposits of sand, gravel, and building stone are now similarly leased, even though the deposits are well known and could be leased with greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

The Acting Director of the Bureau of the Budget has advised that there is no

objection to the presentation of this report to the Congress.

Sincerely yours,

CHARLES WEST,

Acting Secretary of the Interior.

H. REP. NO. 1872

75TH CONG., 3D SESS. (1938).

Mr. Rogers of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 7626]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 7626) to regulate the leasing of certain Indian lands for mining purposes, having considered the same, report thereon with a recommendation that it do pass without amendment.

This proposed bill received the unanimous vote of your committee.

The proposed legislation was suggested by the Secretary of the Interior as can be seen by the following letter addressed to the Speaker of the House of Representatives:

DEPARTMENT OF THE INTERIOR,

Washington, June 17, 1937.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES:

MY DEAR MR. SPEAKER: I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

[Text of letter is omitted. It is a duplicate of the letter appearing in S. Rep. No. 985, 75th Cong., 1st Sess. (1937), supra at 343.]

Sincerely yours,

CHARLES WEST,

Acting Secretary of the Interior.

Office - Supreme Court, U
FILED
JUL 28 1984
ALEXANDER L. STEVA[S]
CLERK

NO. 83-2161 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

-vs-

BLACKFEET TRIBE OF INDIANS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF
ARIZONA, IDAHO, NEVADA AND NORTH DAKOTA
AS AMICI CURIAE IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General

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Chief Counsel, Tax Division
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NO. 83-2161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF MONTANA, et al.,

Petitioners,

-vs-

BLACKFEET TRIBE OF INDIANS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, IDAHO, NEVADA AND NORTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the prior congressional grant of taxation authority to the states under the Act of May 29, 1924, 43 Stat. 244 (25 U.S.C. § 398) survive the passage of the Indian Mineral Leasing Act of 1938, Act of May 11, 1938, 52 Stat. 347 (25 U.S.C. §§ 396a-396g) vis a vis mineral leases entered into after May 11, 1938?

INTEREST OF THE AMICI CURIAE

The amici curiae states are vitally interested in reducing, if not eliminating, the confusion, frustration and expense of litigation that will inevitably be forthcoming in the absence of a resolution by this Court -- one way or the other -- of the substantial and significant issue presented. The continued propensity of courts in the various federal circuits to render opinions on questions of the nature involved herein in a conflicting and often internally inconsistent manner merely exacerbates an already difficult situation.

Beyond this crucial interest, the amici curiae states are concerned over matters of certainty in the

availability (or unavailability) of tax revenues, which monies will be used for the benefit of all their peoples, Indian and non-Indian alike. For example, in the case of the amicus curiae State of Arizona, the uncertainties characterizing the circuit court's majority opinion may have substantial impact upon currently-pending litigation involving in excess of $25,000,000.

The amici curiae states strongly urge this Court to grant the petition for a writ of certiorari in order to dispositively answer the questions raised, thereby, hopefully, eliminating the need for more and more complicated litigation in an area already saturated with uncertainty.

ARGUMENT

The Ninth Circuit decision relies heavily upon this Court's ruling in Bryan v. Itasca County, 426 U.S. 373 (1976) and a 1977 decision of the United States Department of Interior, 84 Int. Dec. 905.

In Bryan, supra, this Court held that the grant of civil jurisdiction to the states under § 4 of Pub.L. 280 (67 Stat. 589, 28 U.S.C. § 1360) did not constitute a congressional grant of power to the states to tax reservation Indians on their reservations. This Court enunciated the principle, 426 U.S. at 393, that doubtful expressions in statutes should be resolved in favor of Indians, particularly in the face of claims that "ambiguous statutes abolish by implication Indian tax immunities...," citing, inter alia, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174, (1973).

In further support of this proposition, this Court relied upon language from the dissent (Murphy, J.) in Oklahoma Tax Commission v. United States, 319 U.S. 598, 613-614 (1943), quoting, 426 U.S. at 392:

"This is so because ... Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow the states to treat Indians as part of the general community."

It is important to note at this juncture that Justice Murphy's dissent in Oklahoma Tax Commission v. United States, supra, makes two additional crucial observations.

First, the antecedent language to which the introductory words "...[T]his is so because..." referred to in the foregoing quote from the dissent are as follows, 319 U.S. at 613:

"There can be no doubt of Congress' plenary power to exempt Indians and their property from state taxation.

. . . .

"To deny such constitutional power is to deny the presupposition of all legislation relating to Indians as well as an unbroken line of decisions

on Indian law in this Court and all that underlies them. This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, <u>except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field</u>. Therefore, so far as the power of [a] state to tax Indian property is concerned, ... <u>a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation</u>." (Emphasis added)

It is therefore apparent that, from Justice Murphy's perspective, if, but only if, Congress expressly demonstrates a clear intention to permit state taxation of Indian interests will such a power be recognized.

Here, there can be no serious dispute that 25 U.S.C. § 398 contains just such an expression of

congressional bestowal upon the states of the power of taxation upon the terms described therein.

Wholly apart from that, once such a power is recognized, it is intellectually inconsistent to conclude, as does the circuit court's majority opinion herein, that something other than a clear and unequivocal repeal, abrogation or supersession of such grant by Congress will suffice to void the previously granted power. As the dissenters correctly point out (729 F.2d at 1207), if Congress had intended to limit the tax authorization of the 1924 Act, it would have done so expressly. Quite simply, while no such showing has or can be logically made upon the facts of this case, the circuit court's majority opinion, if allowed to become final, will stand for this very proposition. Such a result would be most unprecedented and unfortunate.

The second critical observation from Justice Murphy's dissent, insofar as the present case is concerned, is found in footnote 11 thereof. The text supporting that footnote observes, 319 U.S. at 619:

"...[E]ven when permitting specified forms of state taxation of restricted Indian property, Congress has significantly provided in numerous statutes that no tax lien should attach." (Emphasis added)

Footnote 11, with a "see" prefatory signal (i.e., declaring that the cited authority constitutes basic source material that supports the stated proposition), lists five examples of congressional enactments "...permitting specified forms of state taxation of restricted Indian property...." The fourth example of such a specific "...grant by Congress of the withdrawal of the immunity of Indian property from state taxation...." (Murphy, dissenting, 319 U.S. at 613, supra), is the very statute which the circuit court opinion ruled had been "replaced" as of, and for all periods subsequent to, May 11, 1938: 25 U.S.C. § 398.

The significance of this fact is clear. The circuit court opinion, handed down in April, 1984 (46 years after 1938), proceeded upon the assumption that congressional silence with regard to state taxation

power under the 1938 Act (i.e., 25 U.S.C. §§ 396a-396g) was a sufficient justification to conclude that no "carryforward" of the clear taxation power possessed by the states under the 1924 Act (i.e., 25 U.S.C. § 398) was intended. Indeed, to emphasize the point, the circuit court opinion quotes (729 F.2d at 1202-1203) from Girouard v. United States, 328 U.S. 61, 69 (1946) as follows:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

It is apparent from this quote that the circuit court opinion at best puts the "cart before the horse." At worst, the quote begs the question of whether or not the taxation authorization of 25 U.S.C. § 398 was superseded or replaced by 25 U.S.C. §§ 396a-396g. The opinion thereby engenders the argument that any power of taxation under the latter statutes would purportedly have to be implied through reliance upon congressional silence. The amici curiae would respectfully submit that the circuit court's reasoning

epitomizes the frustration and confusion that will be created, leading inevitably to future litigation.

The mere statement of the proposition demonstrates its error: it is the implied repeal, abrogation or supersession of a clear and unequivocal prior grant of state taxation power -- rather than the implied creation of a purportedly non-existent taxation power through congressional silence -- that constitutes the real question here.

As specifically pointed out by the dissent in Oklahoma Tax Commission, supra, four Justices of this Court -- Chief Justice Stone, Justice Murphy, Justice Reed and Justice Frankfurter -- shared the view in 1943 (only five years after 1938) that 25 U.S.C. § 398 was still viable and was in no way repealed, abrogated or superseded in such a manner as to render it anything other than what it had been when originally enacted by Congress: a specific and continuing grant to the states to tax as provided therein.

Ironically, the circuit court opinion voices criticism (729 F.2d at 1203) of the State of Montana's

reliance upon an unpublished, informal opinion of the Interior Department (Memorandum, May 4, 1956, M-36345). That opinion held that the taxation authorization of the 1924 Act, 25 U.S.C. § 398, did, indeed, carry forward to apply to mineral leases entered into under the 1938 Act, 25 U.S.C. §§ 396a-396g. The basis for the criticism of the opinion, other than that it was "informal" and "unpublished", was that it was (729 F.2d at 1202):

> "...not contemporaneous with the enactment of the 1938 statute, but rather, occurred 12 years later."

The irony of this lies in the fact that although the Interior Department overruled the 1956 "informal" and "unpublished" opinion in 1977 (Memorandum, November 7, 1977, 84 Int. Dec. 905, 911) -- nearly 40 years after the enactment of the 1938 Act --, the circuit court stated, 729 F.2d at 1203:

> "...[T]he Department [of Interior] repudiated its earlier [1956] interpretation in 1977, see 84 Interior Dec. 905 (1977), in a published and

carefully reasoned opinion that analyzed both statutes and the Department's prior rulings. In 1979, the Department reexamined and adhered to its 1977 position. See 86 Interior Dec. 181 (1979). Under these circumstances, confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage." (Emphasis added)

Nowhere in its opinion does the circuit court explain why it should not defer to the views of four Justices of the United States Supreme Court, expressed in footnote 11 of the dissent in Oklahoma Tax Commission, supra, rendered merely five years after the passage of the 1938 Act. The dissent in that case, moreover, is relied upon not only by the circuit court through citation to Bryan, supra (see 729 F.2d at 1203) but also by Solicitor Krulitz, the author of 84 Int. Dec. 905.

And, in a similar fashion, nowhere in Solicitor Krulitz' opinion is it explained why perhaps the most contemporaneous and authoratative expression of the relationship between the 1924 Act and the 1938 Act, expressed by four former Justices of this Court, is neither mentioned nor distinguished.

Finally, in addition to all of the foregoing, and as the Petitioner State of Montana herein points out (Pet., pp. 23-24), footnote 16 in McClanahan v. Arizona State Tax Commission, supra, as does footnote 11 in the dissent in Oklahoma Tax Commission, supra, references 25 U.S.C. § 398 as being an example of a statute where Congress has specifically sanctioned the application of state taxes upon unallotted tribal lands. The amici curiae do not have specific knowledge of the source of or reason for the inclusion of that example in the footnote. However, they would point out that, pursuant to the request of this Court dated February 22, 1972, the Solicitor General of the United States (not the Solicitor of the Interior Department), filed

in April, 1972, an amicus curiae brief in the McClanahan case, supra. That brief states, p. 4:

> "...[w]hen Congress has wished to extend to the States the right to tax Indians within a reservation it has done so by carefully delimited legislation. Thus 25 U.S.C. § 398 specifically authorizes the States to tax mineral production on unallotted tribal land." (Emphasis added)

Accordingly, the amici curiae would respectfully submit that, at the very least, the failure to discuss footnote 11 of the dissent in Oklahoma Tax Commission, supra, or footnote 16 in McClanahan, supra, by either the circuit court opinion herein or the Interior Department opinion upon which it relies -- 84 Int. Dec. 905 -- constitutes a compelling reason to grant the petition for a writ of certiorari. The only circumstance that can be reasonably expected to evolve in the absence of a full and complete disposition of the issues herein by this Court is more and more confusion, litigation and frustration for all

parties involved, including the states, the Indians and the mining lessees.

If, indeed, it be the opinion of a majority of this Court that the taxation authorization of 25 U.S.C. § 398 has vanished as a consequence of § 7 of the Act of 1938 declaring that "...all Act[s] or parts of Acts inconsistent herewith are hereby repealed," then the only way to finally and dispositively resolve the confusion and turmoil surrounding these issues is to grant the petition for a writ of certiorari and proceed to a full examination of the question. To borrow a phrase from this Court's holding in Girouard, supra, it will be at best a treacherous and confusing future for all concerned unless the issues raised herein are squarely addressed and resolved.

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CERTIFICATE OF SERVICE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF MONTANA, et al.,
Petitioners,
v.
BLACKFEET TRIBE OF INDIANS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Blackfeet Tribe of Indians in Opposition

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STATEMENT OF THE CASE

Since 1932, the Blackfeet Tribe in Montana has been developing its oil and gas resources on the Blackfeet Reservation as a means of achieving economic independence. Because state taxation of tribal royalty interests from oil and gas leases interferes with that purpose, the Tribe filed suit on October 27, 1978 seeking relief from state taxes and refunds of past tax payments. The suit was brought to invalidate four state taxes that are levied on the Tribe's royalty share from oil and gas production within the Blackfeet Reservation.[1/] The

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[1/]The four taxes are: Oil and Gas Net Proceeds, § 15-23-601 to 616, MCA

Tribe did not challenge the part of the taxes levied on the share of non-Indian producers, which is the larger part of the tax. At the time, the Tribe was the lessor in 125 oil and gas leases.

Prior to 1938, the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397, was the primary authority for leasing unallotted Indian land on treaty reservations for oil and gas purposes. Leases were authorized for a period not to exceed ten years. The Act of May 29, 1924, 43 Stat 244,

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(footnote 1 continued) (Montana Code Annotated), 1979); Oil and Gas Severance Tax, § 15-36-101 to 122; Oil and Gas Conservation Tax, § 82-11-131 and the Resource Indemnity Trust Tax, § 15-38-104 to 109. The Tribe also challenged a fifth tax which was repealed in 1975 (former RCM tit. 84 ch. 220). It is relevant only for refund purposes, not the issue here.

25 U.S.C. § 398, amended the 1891 Act to extend the term of oil and gas leases for "as long as oil and gas is found in paying quantities," and to authorize state taxation of oil and gas production "on such lands." In 1938, Congress enacted a comprehensive Indian mineral leasing statute intended to govern all future Indian mining leases of tribal lands. Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. §§ 396a-396g. The statute does not mention taxation.

Most of the Tribe's leases were made after 1938 under authority of the 1938 Act. Twelve of the leases were made under authority of the 1891/1924 Acts. State taxation of the leases began in the

1930's.[2] Each of the four taxes at issue provides that the producer pay the taxes for its own share and for the share of the royalty owner. Producers deduct the share of taxes allocated to tribal royalties from royalty payments to the Tribe.

The State defended the Tribe's suit on two alternative grounds: that the 1924 Act applies to post-1938 leases, or that the sole legal incidence of the taxes is on the non-Indian producers and the Tribe is not being taxed. The U.S. District Court for the District of Montana held that the 1924 Act

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[2]State taxation of Blackfeet early leases made under the 1924 Act was sustained in British-American Oil Producing Co. v. Board of Equalization, 199 U.S. 159 (1936).

authorized the state taxes in an opinion dated January 6, 1981, which granted summary judgment to petitioners. 507 F. Supp. 446 (D. Mont. 1981). App. C. The District Court did not rule on the legal incidence of the taxes.

The Tribe appealed to the Ninth Circuit Court of Appeals. At issue was: 1) as to leases made under the 1938 Act, whether the 1924 Act applies to authorize state taxation, and 2) as to leases made under the 1891/1924 Acts, whether the 1938 Act repealed the 1924 Act. The Ninth Circuit affirmed the District Court. 729 F.2d 1185 (9th Cir. 1982), App. B. The Tribe petitioned for rehearing *en banc*, which was granted.

The *en banc* decision affirmed the District Court's holding that the 1938 Act did not repeal the 1924 Act. The

Court held that the 1924 Act, including the tax authorization, remains effective for leases made prior to 1938. But for leases after 1936, the Court held that the 1924 tax authorization did not apply. 729 F.2d 1192 (9th Cir. 1984), App. A. The Court remanded the case to the district court to determine the legal incidence of the tax. If the incidence of the tax is found to be on the producer, the Ninth Circuit further directed the district court to decide whether Montana's taxes are preempted under the standards of Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended 665 F.2d 1390 (9th Cir.), cert. denied 459 U.S. 916 (1982). Petitioners seek review of the en banc decision.

SUMMARY OF ARGUMENT

The decision of the court of appeals is correct, is consistent with decisions of this Court, and does not conflict with decisions from other circuits. Review is unwarranted, especially prior to trial on the remanded issues.

The court of appeals correctly applied the rule that state taxation of Indian activities is impermissible unless Congress expressly consents. The court's decision is consistent with the relevant acts and their purposes and policies. The taxes are also impermissible because the act relied on by the state to authorize the taxes was repealed by a later statute. Review is unwarranted for these reasons and because important issues of tax incidence and preemption must be decided

on remand before the case is ripe for review.

ARGUMENT

I. This Case Is Not Ripe For Review

The Ninth Circuit did not decide that any existing Montana tax law is invalid. Although the Court held that the 1924 tax authorization did not apply to leases made under the 1938 Act, the court did not decide the legal incidence of the taxes. That issue was remanded to the district court for determination. In addition, if the legal incidence of the taxes is determined to be on the producer, the court directed the district court to decide whether the tax is preempted under the standards of Crow Tribe v. Montana, supra. Until the issues on remand are decided, this case is not

ripe for review by this Court.

Montana argues that this case should be decided now because there are a number of cases pending before state courts and administrative agencies involving producers who have paid taxes under protest as a result of the present case. However, a decision at this time may not provide further guidance in those cases, and would not provide the basis to finally resolve the cases. Moreover, the $5 million that Montana says has been paid under protest includes taxes paid on the producers' interest as well as the royalty interest. State taxation of the producers' interest is not an issue in this case, and would remain unaffected by a decision by this Court.

Montana also states that the outcome

of this case could substantially affect several cases pending in New Mexico and Arizona. However, the primary issue in those cases is the validity of state taxation of the producers' interest from mineral production on tribal lands. Most of the $25 million which Montana says is at issue in the cases involves taxes on the producers' interest and not the tribes' royalty interests. A decision by this Court would not affect the primary issue in those cases.

II. The Ninth Circuit's Decision Is Correct

A. The 1924 amendment to the 1891 mineral leasing statute authorizes state taxation of mineral production "on such lands." The position of the Tribe and of the Interior Department upheld by the Court below is that "such lands" means

lands leased under the 1924 statute, not under the separate authority of the 1938 Act. This is a question of ordinary statutory interpretation, not one of repeal as the state argues.[3/] The court of appeals correctly held that the 1924 Act does not authorize taxation of leases made under the 1938 Act. Finding that the 1938 Act was intended to supersede prior mineral leasing statutes with its comprehensive and detailed procedures, the court declined to find that Congress "intended that a portion of one of the predecessor statutes [the 1924 Act tax consent] control a lease issued

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3/The Tribe argued repeal as an alternative argument below, and it is argued here as an alternative basis to sustain the judgment below. See III _infra_. The court below held in favor of the State on the repeal issue.

under the 1938 Act." 729 F.2d at 1202.

Starting with the "well settled principle that state taxation of tribal income from activities carried on within the boundaries of the reservation is impermissible unless Congress has expressly consented to the imposition of the tax," Id. at 1194, the court found nothing in the 1938 Act or its legislative history manifesting a purpose to subject leases under the Act to taxes under the 1924 Act, and refused to "infer such a purpose from Congress' silence." Id. at 1202. The court also found that state taxation would conflict with the intent and purpose of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479, to promote "a significant increase in tribal autonomy and authority and the extension

to the tribes of 'an opportunity to take over the control of their own resources'." [Citation omitted]. Id. at 1197.

In its petition, Montana once again confuses the issue of repeal of the 1924 Act by the 1938 Act with the issue of whether the 1924 Act tax authorization applies to leases under the 1938 Act. Montana's arguments are focused only against repeal of the 1924 Act, the issue on which the State prevailed below. The Tribe's primary claim is that state taxation of post-1938 leases is precluded even if the 1924 Act continues to govern earlier leases. The court below recognized the distinction between these issues and held that the 1924 Act was not repealed and remained effective for leases made under it.

Petitioners ignore the primary issue

and argue that the court refused to apply customary rules of statutory construction relating to repeal. However, the court found that all parties conceded that Congress intended the 1938 Act to supersede the 1924 Act. Because the 1938 Act is silent about taxation, the court declined to hold that "a canon of construction will suffice to supply the deficient express manifestation of Congress's intent to permit the tax." Id. at 1202. The court's reasoning is fully consistent with the principles of law governing state taxation of Indian reservation activities. Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

B. The court's decision is also

fully consistent with federal administrative treatment of the taxes. The only administrative opinions which address the issue in this case support the Tribe.

The first administrative opinion to consider the relationship between the 1924 and 1938 statutes held that leases made under the 1938 Act are not subject to taxation under the 1924 Act. 84 Int. Dec. 905 (1977), App. H at 267. The 1977 opinion was followed in 1979. 86 Int. Dec. 191 (1979), App. H at 316. No opinion prior to 1977 considered the question petitioners ask this Court to review, and no opinion before 1956 even mentioned the 1938 Act. [4/]

[4/] A 1943 opinion construed the 1924 Act to authorize taxation of leases made under that Act, relying on British-American Oil Producing Co. v.

As the only administrative decisions on point, deference should be given to the 1977 and 1979 opinions and not the earlier decisions on other issues. Zemel v. Rusk, 381 U.S. 1, 11 (1965). See, Baltimore & Ohio R. Co. v. Jackson,

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(footnote 4 continued) Board of Equalization, supra. 58 Int. Dec. 535 (1943), App. H at 232. An unpublished opinion in 1954 concluded that the Interior Department could authorize lessees to pay directly to the state taxes imposed on tribal royalty interests even though the 1924 Act provides for payment by the Secretary. Op. Sol. Int. Oct. 29, 1954 (M-36246) App. H at 248. The opinion relied on British-American and the 1943 opinion. An unpublished 1955 memorandum concluded that Montana could tax oil and gas royalties of the Ft. Peck Reservation tribes, but again it relied only on the 1943 opinion and did not refer to the 1938 Act. Memo Assoc. Sol. Int., Oct. 13, 1955 (M-36310) App. H at 258. Unpublished opinons in 1956 and 1966 addressed the repeal issue only. Memo Assoc. Sol. Int., May 15, 1956 (M-36345), App. H at 232; Letter from A.R. Anderson, Acting Secty. Int. to Marvin Sonosky, Oct. 23, 1966, reprinted at 84 Int. Dec. 914 (1977) App. H at 301.

353 U.S. 325, 330-31 (1957).[5]

C. Petitioners argue that the court of appeals misconstrued and misapplied the policy of the 1934 Indian Reorganization Act, supra. However, petitioners misunderstand the court's analysis. The court of appeals did not hold, as petitioners suggest, that the IRA ended state taxes authorized by the 1924 Act. Pet. 47. Instead the court only looked to the IRA to assist it in interpreting the 1938 Act, because the

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5/Petitioners reliance on "long-time administrative practice and common understanding," Pet. 21, ignores the factual realities of the case. The issue here was not immediately raised after passage of the 1938 Act because leases existing at the time had been made under the 1891 statute. Until leases under the 1938 were entered into and began producing, no taxation issue would arise. Thus the forty year period cited by petitioners is greatly overstated.

court had determined that the 1938 Act was meant to bring Indian mineral leasing into harmony with the IRA. 729 F.2d supra at 1198. It found that the IRA was intended to promote tribal autonomy and tribal control of natural resources, and that these policies are more consistent with royalty tax exemption. The court therefore concluded that the purposes of the 1938 Act, which reflected the policies of the IRA, would not be furthered by incorporation of the 1924 Act, and its tax consent provision. Id. at 1203. This interpretation is fully consistent with the 1934 and 1938 Acts and their legislative histories. See, S. Rep. No. 985, 75th Cong. 1st Sess. 3 (1937); H.R. Rep. No. 1872, 75th Cong. 3d Sess. 3 (1938).

The court's analysis of the IRA does not conflict with decisions of other courts. The cases from the Eighth and Tenth Circuits cited by petitioners are cases involving repeal of statutes. Nebraska Public Power Dist. v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956 (8th Cir. 1983); Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982). Here, the court of appeals expressly found no repeal of the 1924 Act, so there is no conflict with the cases from other circuits.

Nor does the Ninth Circuit's decision conflict with decisions of this Court. Neither Escondido Mutual Water Co. et al. v. LaJolla Band of Mission Indians et al., 104 S. Ct. (1984) nor Rice v. Rehner, 103 S.Ct. U.S. (1983), even mentions the Indian Reorganization

Act nor has anything to do with mineral leasing. Indeed, this Court has frequently looked to the IRA and its policies in striking down state regulation of Indian activities within reservations. See, New Mexico v. Mescalero Apache Tribe, 103 S.Ct., (1983); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832(1982); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Moe v. Confederated Salish and Kootenai Tribes, supra.

Petitioners contend that decisions of this Court "suggest" that the 1924 Act tax consent applies to 1938 leases, Pet. 23-27, but the opinions cited make no such suggestion. In McClanahan v. Arizona Tax Commission, 411 U.S. 164

(1973), the Court cited the 1924 Act, along with other acts, as an example of express congressional authorization of state taxation. Id. at 177 n. 16. The example is valid, but its citation says nothing about the issue here--whether the 1924 Act tax consent applies to leases under 1938 Act. In Merrion v. Jicarilla Apache Tribe, supra, the issue of the relationship between the 1927 Indian Mineral Leasing Act[6/] and the 1938 Act was specifically not decided by the courts below and was not an issue in this Court. The Court's statement that "the mere existence of

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[6/] Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398a. The 1927 Act is similar to the 1924 Act but applies only to executive order reservations. The Act has a similar tax consent provision.

state authority to tax does not deprive the Indian Tribe of authority to tax," 455 U.S. at 151, refers to taxation of the producers' interest and says nothing about whether authority exists to tax tribal royalties under leases made under the 1938 Act. Neither case addresses the issue here, nor is any suggestion made about the 1924 Act's applicability to post-1938 leases.

D. Petitioners argue that in recent legislation and legislative proposals, Congress has indicated that the 1924 Act tax consent is still in effect for leases made under the 1938 Act. Neither the statute nor the legislative proposal cited by petitioners support their statement. The Indian Mineral Development Act of

1982, 96 Stat. 1938, 25 U.S.C. § 2101-2108, provides that agreements under the Act "shall not be subject to the 1938 Act, or to any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe." 25 U.S.C. § 2105. The provision has no bearing on how the 1924 Act relates to leases under the 1938 Act. The legislative proposal to limit state severance taxes likewise has no bearing on the issue here. The proposal applies to coal mined on Indian lands, but no distinction is made between taxation of the producer's interest and tribal royalty interests. Certainly no mention is made of the 1924 Act and whether it authorizes the application

of state severance taxes to tribal royalty interests.

III. The 1924 Act Tax Consent Does Not Authorize The Taxes At Issue Because It Was Repealed By the 1938 Act

Section 7 of the 1938 Act expressly repealed "all Act (sic) or parts of Acts inconsistent herewith." The court of appeals held that the 1924 Act was not repealed and remained effective for leases of indefinite term which were authorized by the 1924 Act and other earlier statutes. The court was concerned about the uncertainty of the legal status of such leases if it held that the earlier statutes were repealed. 729 F.2d supra at 1200. However, the court's concern is not a sufficient basis to find that the 1924

Act was not repealed.[7]

The existence of an express repealer such as Section 7 has been found to be a factor favoring a finding of repeal by implication. Andrus v. Glover Construction Co., 446 U.S. 608, 617-19 (1980). Even though there is no express repeal of the 1924 tax consent, it does substantially conflict with the policies of the 1938 Act and the Indian Reorganization Act. The 1938 Act was meant to bring uniformity to the area of Indian mineral leasing. H.R. Rep. No. 1872, supra; S. Rep. No. 985, supra. The continuing existence of

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[7] It is not necessary to find that the entire Act was repealed. The 1924 Act can continue to sustain leases made under it, even if the tax consent provision is repealed.

the tax authorization conflicts with this purpose. It also conflicts with the purposes of the IRA to promote tribal independence and economic power. See, 78 Cong. Rec. 11126-27 and 11173 (1934). State taxation of tribal oil and gas royalties has the effect of discouraging economic development.

In Plains Elec. Gen. & Tr. Co-op., Inc. v. Pueblo of Laguna, 542 F. 2d 1375 (9th Cir. 1976), a 1926 condemnation statute was held to have been repealed by a 1976 statute that made the 1948 Indian Rights of Act, 62 Stat. 17, 25 U.S.C. §§ 323-328, applicable to Pueblo tribes. The 1948 Act was meant to bring uniformity to the granting of rights of way across Indian lands and to implement the policies of the IRA. The Court held

that the policies of the 1948 Act and the IRA "would be nullified by the continued validity" of the 1926 Act. Id. at 1380-81. Thus, repeal is supported by case law, and is not foreclosed by any canons of construction cited by petitioners. See, Andrus v. Glover, supra.

The administrative opinions which found no repeal, cited earlier at 15-16, did not consider the issue in light of the purposes and policies of the 1938 Act and the IRA. Nor had Andrus v. Glover, supra, and Plains Electric been decided. Therefore, the opinions are of limited value.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 83-2161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
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BLACKFEET TRIBE OF INDIANS,
Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This case presents important questions of federal law which have not been, but should be, settled now by this Court. The Blackfeet Tribe's brief in opposition presents analyses which purport to belittle the impact of this case and the significance of the question presented for review, not only as the case affects petitioners, but also as it affects other western states. See Brief of Arizona, Idaho, Nevada, and North Dakota as Amici

Curiae. At the same time, the Tribe takes positions contrary to petitioners on significant issues on which circuit courts are divided and which require resolution by this Court. Furthermore, the Tribe disputes some of the conclusions and reasoning of the Ninth Circuit's opinion, and presents what appears to amount to a cross petition for certiorari on some issues. Overall, the Tribe's positions emphasize, rather than diminish, the compelling reasons for granting certiorari in this case.

The Tribe argues first that this case is not ripe for review and that a decision by this Court in this case will not resolve the numerous cases pending in various courts where state taxes on oil and gas production on tribal lands are in question. The Tribe argues that the question presented here is limited and

unimportant.

In taking these positions, the Tribe ignores the fact that this case presents an important question of first impression for this Court. The petition cites the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177 n.16 (1973), as an indication that the issue presented here is an important one which remains unanswered by this Court. Pet. 23-27. The Tribe does acknowledge this discussion and citation by the State, but then misreads them as arguments by the State that this Court has already decided the issue in favor of the State. Tribe's Brief at 20. As the State's topic heading and the discussion in the petition make clear (Pet. at 21), McClanahan is cited and discussed for the purpose of showing that although this Court has paid attention to the important issue of states' powers to

tax mineral production on tribal lands under post-1938 leases, it has not yet decided that issue. Nothing in the Tribe's brief diminishes the import of the question presented for review.

In addition to ignoring the fact that the issue presented here is an important one of first impression for this Court, the Tribe insists that because it is challenging only the State's taxes imposed on tribal royalties, the outcome of this case will have no effect on the many pending cases which challenge taxes on the producers' interests as well as on tribal royalty interests. Tribe's Brief at 9-10. This position is absurd. It is obvious that the Ninth Circuit opinion, if left unreviewed, will affect pending cases and future cases filed before final disposition of this case. For example, in Crow Tribe of Indians v. State of Montana,

650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982), the post-trial brief of the Crow Tribe is replete with references to the Ninth Circuit opinion in the instant case. Furthermore, it is obvious that if, as a matter of law, the State and counties may impose their taxes on the Tribe's royalty share in this case, they can also tax the producers' share of production of oil and gas. Resolution of the pure legal question of whether or not the royalty share may be taxed certainly will determine the outcome of cases where the producers' shares are being taxed.

In a further attempt to minimize the impact and effect of the Ninth Circuit's decision, the Tribe states that this case presents a simple question of ordinary statutory interpretation that does not

require review by this Court. According to the Tribe, this simple question involves an interpretation of the meaning of the words "such lands" in the 1924 Act. Tribe's Brief at 10-11. The words "such lands" appear in a sentence in the 1924 Act which reads, "Provided, that the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands...." Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398, Pet. App. 152. The Tribe argues that "such lands" mean lands leased under the 1924 Act, so that only production from lands leased under the Act can be taxed by the State. This argument was not adopted by the Ninth Circuit. Moreover, the Tribe's argument is wrong. This Court has already considered the meaning of the words "such

lands" contained in the 1924 Act in British-American Oil Producing Company v. Board of Equalization, 199 U.S. 159 (1936). There, this Court held that "such lands" are "'unallotted land on Indian reservations,' other than lands of the Five Civilized Tribes and of the Osage Reservation, which are subject to lease for mining purposes" under a proviso of Section 3 of the Act of February 28, 1891. (Pet. App. 150.) That proviso reads: "Where lands are occupied by Indians who have bought and paid for the same, and which lands are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians,..." Thus, "such lands" are simply unallotted lands on the Blackfeet Reservation, including minerals reserved for the benefit of the Blackfeet Tribe, regardless of the status of the surface

lands. British-American Oil Producing Company, supra, 299 U.S. at 164. The Tribe's suggestion that the instant case can be decided simply with a new interpretation of these two words, without reading the 1924 and the 1938 Acts together, is completely without foundation. The Tribe's argument for a simple resolution of this case by interpreting "such lands" as suggested is additionally weakened by the Tribe's own argument that the 1938 Act repealed the 1924 Act. Tribe's Brief at 7, 24-27.

The Tribe states that its argument that the 1938 Act repealed the 1924 Act is merely an alternate justification for the Ninth Circuit opinion. Tribe's Brief at 11 n.3. Yet before and after this disclaimer, the Tribe makes the argument that the "taxes are also impermissible because the act relied on by the state to

authorize the taxes was repealed by a later statute." Id. at 7. The Tribe on the one hand attempts to support the opinion of the Ninth Circuit that the 1924 Act was replaced, and on the other hand attempts to show that consistency with the policies of the Indian Reorganization Act and the 1938 Act's goal of bringing uniformity to the area of Indian mineral leasing compels the conclusion that the 1924 taxation authority was repealed. Although the Tribe has not filed a cross-petition for certiorari, it apparently does not subscribe to the Ninth Circuit's finding that the 1938 Act replaced the 1924 Act, and that the 1924 Act continues to be viable for leases executed prior to May 11, 1938. This dispute highlights the reasons for this Court's review of this case.

An additional reason for granting

certiorari is the need for this Court to give guidance to circuit courts of appeal as to what they should do when two statutes on the same subject exist, particularly in an area affecting Indians and Indian Tribes. As discussed in the petition for certiorari, there currently is a conflict among the circuits on what approach is correctly taken under the circumstances found in this case.

The Tribe at one point dismisses the State's discussion of cases on the interpretation of statutes when there are two statutes on the same subject, saying that the cases cited by the State, Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956 (8th Cir. 1983), and Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), are irrelevant because they deal with statutory repeals. Yet the

Tribe itself elsewhere in its brief cites some cases in support of its view that there has been a repeal of the 1924 Act by the 1938 Act. Tribe's Brief at 25-27. Although the State does not necessarily agree that the Tribe's cases, Andrus v. Glover Construction Co., 446 U.S. 608 (1980), and Plains Elec. Gen. and Tr. Co-Op, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (9th Cir. 1976), stand for the propositions for which they are cited, the Tribe's reliance on these cases and its interpretation of them is further support for petitioners' position that this Court should review this case and give guidance to the circuit courts of appeal on how to view two statutes dealing with the same subject.

In its attempt to bolster the Ninth Circuit's rationale that the Indian Reorganization Act's [hereinafter I.R.A.]

policies compel the conclusion that the leases made after 1938 are not subject to the taxation authority contained in the 1924 Act, the Tribe argues that the 1924 Act's taxation authority "conflicts with the purposes of the I.R.A. to promote tribal independence and economic power. See, 78 Cong. Rec. 11126-27 and 11173 (1934)." Tribe's Brief at 26. This is the Tribe's only citation purporting to set forth the purposes of the I.R.A. An examination of 78 Cong. Rec. 11126-27 reveals no such conflict. Those pages do contain Congress' discussion of the proposed I.R.A., including expressions of some concern about the need for tribal independence and power. However, the focus of Congress was clearly on the historic oppression of Indians by the Bureau of Indian Affairs bureaucracy and on the evils of the past allotment system.

Congress' concerns with correcting those problems are not in conflict in any way with the taxation authority in the 1924 Act. Page 11173 deals with resignations and appointments of postmasters throughout the United States, and apparently is a mis-citation. In short, the citation used by the Tribe as its primary evidence that the taxation authority in the 1924 Act conflicts with the purposes of the I.R.A. shows nothing relevant to this case. The Tribe's and the Ninth Circuit's misreliance on and misinterpretation of the I.R.A. and the policies point further to the need for review of this case by this Court.

This case presents an excellent opportunity for this Court to answer important questions of law which should be settled now, without having to address collateral questions of fact and law.

Review now would spare the parties the delay and expense of trial that would be required by the Ninth Circuit upon remand. Although the Tribe's brief asserts that the State's taxes interfere with the Tribe's economic independence and economy (Tribe's Brief at 1, 26), there are no allegations in the pleadings in this case of such an effect of these taxes. See First Amended Complaint of Blackfeet Tribe of Indians, Pet. App. 131. There is no evidence of such interference in the record. Also, the record is bare of allegations of, evidence on, or concern with the question of whether the taxes may have been pre-empted under the standards of Crow Tribe of Indians v. Montana, supra, if the tax incidence falls on the producers. The Tribe's unsubstantiated and belated allegations that the taxes at issue adversely affect the Tribe and

interfere with the Tribe's economic independence only emphasize the importance of ruling now on the question presented. The parties need a definitive answer from this Court. The question will not go away. Years of expensive litigation on collateral factual issues will not eliminate the necessity for this Court ultimately to answer the question presented here and now.

Nothing in the brief of the Blackfeet Tribe in opposition to the petition for certiorari diminishes the fact that this case is one of great importance which because of recurring litigation should be reviewed now by this Court. In addition, the case is important because it offers an opportunity for the Court to give guidance to the courts of appeal on what standards of construction should be used when two statutes deal with the same subject

matter. The petition for a writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

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STATE OF MONTANA, *et al.*,
Petitioners,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NEW MEXICO, ARIZONA, ALASKA, CALIFORNIA, IDAHO, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE STATE OF MONTANA

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QUESTION PRESENTED

May states impose their severance taxes on royalty payments to tribes from non-Indian severing activities which take place on reservation land pursuant to the taxing provisions in 25 U.S.C. § 398 and 25 U.S.C. § 398c which specifically allow states to impose their taxes on such royalties?

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF AMICI CURIAE STATES

The states filing this brief as amici curiae on behalf of the State of Montana have a strong interest in the outcome of this case. All are states with mineral wealth whose fiscal integrity will be affected by this Court's determination of whether the states may tax royalty payments to tribes from non-Indian severance on reservation land. New Mexico, Arizona, and Utah, for example, are important producers of various minerals

including crude oil, gas, coal and uranium. More uranium is mined in New Mexico and the state has greater uranium reserves than any other state. In the production of gas, New Mexico ranks fourth in the nation, and in the production of crude oil, seventh. It is estimated that New Mexico contains 2.4 billion tons of strippable coal reserves,[1] while Arizona contains approximately one billion tons of strippable coal reserves.[2]

Taxes on mining and oil and gas extraction are important sources of revenue for the amici states, some of which have relatively small populations for their large areas.[3] The low population density increases the cost of providing adequate state services, while the relative lack of industrialization in these states minimizes the tax base.

Increased development of energy resources will inevitably impose significant costs on the states. Large scale development of these resources will necessitate direct expenditure of funds by the states to regulate, monitor and control pollution. Energy development in rural areas necessitates expenditures of state funds for road construction and maintenance. Moreover, the influx of new workers in rural areas causes dramatic impacts on state expenditures,[4] since new communities equipped with

[1] Bureau of Geology in the Mining and Minerals Division of the New Mexico Energy and Minerals Department, New Mexico's Energy Resources '81, at 8, Table 1 (1981).

[2] Arizona Bureau of Mines, Bulletin 182, Table II, p. 27 (1970).

[3] For example, the populations of New Mexico and Arizona are 1,299,968, and 2,717,866, respectively, while New Mexico contains 121,412 square miles and Arizona's area in square miles is 113,417, according to the Council of State Governments, *The Book of the States* 1982-83, at 714 and 700 (1982).

[4] Western Governors' Regional Energy Policy Office, Financial Strategies for Alleviation of Socioeconomic Impacts in Seven Western States, at 2 (1977).

schools, utilities, fire and police protection, and recreation and health facilities must be built.

A significant amount of the energy production in several of the amici states occurs and will continue to occur on Indian lands. Indian lands comprise large percentages of the states' total acreage. For example, in New Mexico, Indian lands account for approximately twenty percent of the state's total area, while in Arizona the total is almost twenty-seven percent. Portions of the Navajo and Ute Reservations are located within Utah. Forty-four percent of the uranium produced in New Mexico in 1979 came from Indian lands,[5] and forty-two percent of all coal mined the same year came from Indian lands.[6] Many of the mineral reserves in New Mexico are also on Indian lands: sixty-two percent of the strippable coal reserves are on Indian land, as are between twenty-five and fifty-five percent of New Mexico's most certain uranium reserves.[7] Likewise, approximately seventy-five percent of all uranium in Arizona is on the Navajo Indian Reservation.[8] A full one hundred percent of the coal mined and oil extracted in Arizona is from Indian land; all

[5] This figure is calculated by comparing tons of uranium ore produced on Indian lands in New Mexico in 1979 (*see* Geological Survey, Conservation Division, United States Department of the Interior publication, Federal and Indian Lands: Coal, Phosphate, Potash, Sodium, and Other Mineral Production, Royalty Income, and Related Statistics, at 177 (June 1980)) with the tons of uranium ore produced in New Mexico in 1979 (*see* Bureau of Geology in the Mining and Minerals Division of the New Mexico Energy and Minerals Department, New Mexico's Energy Resources '80, at 35, Table 27 (1981)).

[6] New Mexico's Energy Resources '80, at 30, Table 21.

[7] New Mexico's Energy Resources '80, at 30, Table 21 and calculations at 26 from Table 12.

[8] Arizona Department of Energy, Open File Report, Radioactive Occurrences and Uranium Production in Arizona (1981).

of the reserves of those minerals are located on Indian reservation lands.[9] Clearly, if these and other states lose their ability to tax mineral production by non-Indian lessees on Indian lands, they will lose substantial revenues, thereby decreasing their ability to effectively serve their citizens[10] and to contribute to energy development.

The current case is additionally important to the amici states because its resolution may affect the outcome of numerous cases pending before various courts in each of these states which challenge the states' ability to tax oil and gas production and coal, uranium and other mineral severance from various Indian lands. Because of the importance of the issues raised, the amici states hereby submit this brief in support of the validity of the taxing authorizations contained in the 1924 and 1927 Acts.

SUMMARY OF ARGUMENT

In 1924 and again in 1927, Congress, after lengthy discussion and study, specifically provided that production of oil, gas and other minerals from Indian reservation land could be taxed by the state in which the land was located in all respects the same as production from non-reservation land. Montana and the amici states have imposed severance taxes on Indian royalties and on non-Indian production from reservation land since that

[9] Arizona Bureau of Mines Bulletin No. 182, Table II, p. 27.

[10] This includes reservation Indians. Under 8 U.S.C. § 140(b) (1983), Indians are citizens of the United States. Consequently, Indians residing in the amici states are citizens of these states. U.S. Const. amend. XIV, § 1; *see, e.g., Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962) and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). As such, they are entitled to all the benefits of state law to which non-Indians are entitled. U.S. Const. amend. XIV, § 1.

time. The Department of the Interior interpreted the 1924 and 1927 Acts as permitting state taxation and actively assisted in the collection of the state taxes until 1977. This long-standing and contemporaneous administrative determination by the Department of Interior that the 1924 and 1927 Acts authorize state taxation and are unaffected by the general 1938 Mineral Leasing Act supports the states' authority to tax and should be given deference. The Mineral Leasing Act of 1938 which set forth standard procedures for the leasing of Indian lands did not address the issue of state taxation and the legislative history evidences no intention on the part of Congress to repeal its earlier express authorization of state taxation. The 1924 and 1927 taxing authorizations continue to be in effect because they have not been expressly or impliedly repealed by the Mineral Leasing Act and thus Montana's taxes and those of the amici states are specifically authorized by law.

The court below held that the Indian Reorganization Act created an ambiguity in the unambiguous provisions of the 1924 and 1927 Acts authorizing the states' taxes. Once having found this ambiguity, the Ninth Circuit then employed the canon of construction requiring that ambiguous statutes be interpreted in favor of Indians to conclude that the lack of express incorporation of the taxing authorization in the 1938 Mineral Leasing Act effected a partial implied repeal of the taxing authorization. There is no authority for applying this rule of statutory construction in interpreting the Indian Reorganization Act because the Indian Reorganization Act creates no ambiguity in the otherwise clear statutory authorization of the states' taxes. Thus there is no need to employ any canons of construction because the 1924 and 1927 Acts and the Indian Reorganization Act are unambiguous. The Ninth Circuit's attempt to shift the analysis from whether the Mineral Leasing Act impliedly repealed the 1924 and 1927 taxing authorizations to whether the Mineral Leasing Act expressly incorporated the taxing provisions should be rejected because there exists no rule

or authority upon which to premise this alteration of the statutory analysis.

Congress, in enacting the original taxing authorizations, recognized the states' need to offset, through collection of state taxes, the substantial costs associated with severing activities occurring on Indian land. The original purpose behind permitting state taxation continues today because Montana and the amici states provide substantial services to tribes, tribal members, and non-Indian producers.

Finally, if this Court adopts the analysis used by the Ninth Circuit in deciding that Congress, by enacting the Mineral Leasing Act intended to repeal the earlier taxing authorizations, that holding should be applied only to the question presented, whether Montana can tax the royalties paid to the tribe; only the state tax on the royalty should be addressed and not state taxation of non-Indian producers.

Montana's taxes on the royalty share have been imposed pursuant to a currently valid and effective congressional authorization and are justified because of the services provided and should therefore be upheld.

POINT I

MONTANA'S TAXES ON OIL AND GAS OPERATIONS ON THE BLACKFEET RESERVATION ARE VALID BECAUSE CONGRESS SPECIFICALLY AUTHORIZED STATE TAXATION OF INDIAN ROYALTIES AND NON-INDIAN SEVERANCE OF OIL AND GAS FROM RESERVATION LAND.

The Blackfeet Tribe of Indians challenges Montana's authority to tax the tribe's royalty share received from severance of oil and gas from leased lands on the Blackfeet Indian Reservation. However, Montana's taxes are valid as a matter of law.

Congress expressly authorized Montana's taxes on royalties from mineral production from the Blackfeet Reservation in a provision of an act authorizing mineral leasing and taxation on unalloted Indian lands. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. § 398 (1983) (hereinafter the 1924 Act). The 1924 Act provided that

> the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: . . . .

25 U.S.C. § 398. Congress reaffirmed this authorization for executive order lands in the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. § 398a-e (1983) (hereinafter the 1927 Act).[11] Pursuant to the authorization contained in the 1924 Act, Montana has imposed severance taxes on tribal royalties derived from non-Indian production from reservation lands located in Montana. New Mexico's and Utah's taxes are imposed pursuant to the authorization enacted in 1927: Arizona and California derive authority to tax from both Acts.

A. Congress' intent to permit state taxation of mineral production from Indian lands is evident from the legislative history of the 1924 and the 1927 Acts.

---

[11] The 1927 Act states in relevant part: "Taxes may be levied and collected by the state or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied and collected and such taxes may be levied against the share obtained for the Indians. . . ." 25 U.S.C. § 398c.

The legislative history of the 1924 and 1927 Acts clearly evidences Congress' intention that states be permitted to tax royalties paid to the tribe from mineral severing activities occurring on Indian lands. During debate on the 1924 Act, the question whether states should be permitted to impose their taxes on both severance by non-Indian lessees from reservations and on the Indians' royalty share was examined and debated.[12] *See, e.g.,* 65 Cong. Rec. 6844 (1924). In a letter commenting on the taxing provision, Secretary of the Interior Work stated that "[t]his department realizes that the State should at least be permitted to tax the lessees' interest in any production of minerals on restricted unallotted Indian lands and will offer no objection to including a tax on the royalty belonging to the Indians. . . ." H.R. Rep. No. 386, 68th Cong. 1st Sess. 2 (1924). The final result of the Acts was that the "entire output of oil and gas will be taxed by the States, the producer paying upon his share and the Indians upon the share obtained for them." H.R. Rep. No. 1791, 69th Cong., 2d Sess. 4 (1927); *see also id.* H.R. Rep. No. 763, 69th Cong., 1st Sess. 5, 6 (1926).

There was general agreement expressed at hearings on the original bills which resulted in the final versions of the Acts that the states ought to benefit from the production of minerals on Indian land. The American Indian Defense Association endorsed the idea that the mineral output from Indian lands

12 Both the 1924 and 1927 Acts allow state taxation of the Indian's royalty share. Montana has asserted throughout this litigation that it does not impose its severance taxes on the royalties paid to the tribe. New Mexico and Utah voluntarily do not tax the royalties and Arizona, pursuant to authority from the Arizona Supreme Court, *Industrial Uranium Co. v. State Tax Commission,* 95 Ariz. 130, 387 P.2d 1013 (1963), imposes its taxes upon the royalty share. Whether the state severance taxes are imposed on the royalties is not relevant, however, because Congress has the authority to permit the states to tax the royalties and chose to do so in enacting the 1924 and 1927 Acts. *See also* Point III, below.

should yield a revenue to the states. *Hearings on S. 1722 and 3159 before a subcommittee of the Senate Committee on Indian Affairs,* 69th Cong., 1st Sess. 68 (1926). Moreover, taxation by the states was not seen as inimical to tribal benefit from the development of natural resources from their reservations because the tribes would continue to receive royalties from the leases. *See* 68 Cong. Rec. 4573 (1927) (remarks of Congressman Leavitt); 68 Cong. Rec. 4578 (1927) (remarks of Congressman Frear); *see also* H.R. Rep. No. 1791. As intended by Congress, the Acts of 1924 and 1927 clearly and unequivocally provided for state taxation.

More recently, Congress recognized the validity of state taxation of non-Indian severance from reservation lands. This continued recognition of the states' power to tax is demonstrated by recent legislative proposals to limit state severance taxes to a 12.5 percent rate. The limitation would have specifically applied to state severance taxes on energy resources "mined or produced on Indian lands. . . ." S. 2695, 96th Cong., 2d Sess. (1980); H.R. 6625, H.R. 6654 and H.R. 7163, 96th Cong., 2d Sess. (1980); S. 1778, 95th Cong., 2d Sess. (1979). Thus Congress' actions indicate a long-standing and continued recognition of state power to tax severance of minerals by non-Indian lessees from reservation land.

B. The taxing provisions of the 1924 and 1927 Acts have not been repealed.

The tribe argues that the explicit authorizations of state taxation in the 1924 and 1927 Acts have, in effect, been repealed by the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396 (1983) (hereinafter the 1938 Act). The tribe asserts that tribal leases made after the effective date of the 1938 Act were made pursuant to the 1938 Act, and that prior leasing provisions have no applicability to these leases. If

adopted, this analysis would render the taxing provisions of the 1924 and 1927 Acts without effect. The practical result of this approach would be to find that these provisions had been repealed by the 1938 Act.[13]

The 1938 Act authorizes leasing of unallotted lands owned by a tribe, group or band of Indians. The underlying congressional purposes of the proposed legislation, which resulted in the policies stated in the Act itself, are disclosed in committee reports on preliminary versions of the Act that became law. One purpose was to obtain uniformity in the law relating to the leasing of tribal lands for mining purposes; the diversity in mineral leasing statutes had resulted in some lands not being subject to leasing for general mining purposes. While the oil and gas leasing provisions in the 1924 and 1927 Acts fulfilled the policies of encouraging tribal economic development and self sufficiency, the leasing provisions in other acts with regard to other minerals did not similarly accord with the intent of the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1976)) (hereinafter the I.R.A.). *See* H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 614, 74th Cong., 1st Sess. 1 (1935); 79 Cong. Rec. 7815 (1935). A second purpose was to give Indians more income from their land by encouraging and facilitating mineral leasing; existing law created a hindrance to leasing lands for mining of some minerals in certain circumstances, thereby

[13] The impractical result of the Ninth Circuit's opinion is that a partial repeal by implication has occurred. Because the Ninth Circuit held that the 1924 Act governs leases entered into between 1924 and 1938, but not after, only a partial repeal has been effected in the Ninth Circuit's opinion. The *Blackfeet* dissent found it particularly inappropriate to conclude that the 1924 Act was still effective but then to give it no force. *Blackfeet Tribe of Indians v. State of Montana,* 729 F.2d 1192, 1204 (9th Cir.), *pet. for cert. granted,* 53 U.S.L.W. 3203 (Oct. 1, 1984).

depriving tribes of vast revenues. *Id.* A third purpose of the legislation was to give Indians a voice in granting all mineral leases, not just those for oil and gas. H.R. Rep. No. 1872 at 2; S. Rep. No. 985 at 2; S. Rep. No. 614 at 2; 79 Cong. Rec. 7815 (1935). The 1938 Act simply provided uniform procedures for leasing different types of Indian land while recognizing the tribes' right to enter into such leases; the 1938 Act did not in any manner concern, discuss or address the issue of taxation.

The taxing provisions of the 1924 and 1927 Acts may be given effect without conflicting with the general policies of the 1938 Act. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective," *Morton v. Mancari,* 417 U.S. 535, 551 (1974), "in the absence of some affirmative showing of an intention to repeal the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," *id.* at 550, and "courts are not at liberty to pick and choose among congressional enactments" when two statutes are capable of co-existence, as are the statutes at issue here.[14] *Id.* at 551. There is no conflict between the leasing provisions of the 1938 Act and the taxing authorizations of the 1924 and 1927 Acts. Both the 1924 and 1927 Acts authorize state taxation of mineral production; the 1938 Act makes no reference to such taxation. Taxation of production does not affect the leasing procedures of the 1938 Act. Because the taxing provisions of the 1924 and

[14] Congress would be expected to have mentioned such a change in its outlook on state taxation of Indian minerals if it had intended to repeal the authorization of state taxation, *Watt v. Alaska,* 451 U.S. 259, 271 (1981); *United States v. United Continental Tuna Corp.,* 425 U.S. 164 (1976), particularly where Congress did not act to alter an agency interpretation of that statute. *See United States v. Rutherford,* 442 U.S. 544 (1979); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969).

1927 Acts may be given effect without conflicting with the general policies of the 1938 Act there is no basis for an implied repeal.[15] *United States v. United Continental Tuna,* 425 U.S. 164 (1976); *Morton v. Mancari.*

Further the existence of Section 7 of the 1938 Act, which provides that all inconsistent acts or part of acts were repealed, "implies strongly that there may be acts on the same subject which are not thereby repealed," *Hess v. Reynolds,* 113 U.S. 73, 79 (1885), and "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." *Henderson's Tobacco,* 78 U.S. (11 Wall.) 652, 656 (1870); *see also United States v. Greathouse,* 166 U.S. 601 (1897). Thus, that the 1938 Act was intended to be a general treatment of the leasing procedures does not establish an intention that the Act be a substitute for either the 1924 or 1927 Acts; rather, the language of Section 7 of the 1938 Act evidences the clear intention that repeal be limited to inconsistent acts alone.[16] Because the 1924 and 1927 taxing provisions are not inconsistent with the general leasing statute, there can be no implied repeal.

[15] There can be no finding of congressional intent to effect a repeal of the taxation provisions of the earlier acts by implication because the legislative history of the 1938 Act is silent as to taxation. Congressional silence on the taxation issue in 1938 is significant because the taxing provisions of the 1924 and 1927 Acts were the subject of extensive debate. When Congress has focused on a subject in a specific statute, passage of a more general act does not indicate an intent to repeal. *See Radzanower v. Touche Ross & Co.,* 426 U.S. 148 (1976); *Morton v. Mancari; Ex Parte Crow Dog,* 109 U.S. 556 (1883).

[16] Further support that Congress recognized the continued existence of other acts is found in Section 4 of the 1938 Act which provides "[t]hat all operations under any oil, gas, or other mineral lease issued pursuant to this or *any other Act* affecting restricted Indian lands . . ." (emphasis added), are to be subject to rules and regulations of the Department of Interior.

There is no conflict between the 1924 and 1927 Acts which permit state taxation and the 1938 Act which does not address that issue. The two laws are complementary because they evidence Congress' intent to establish generally applicable mining standards in the 1938 Act and taxation powers in the 1924 and 1927 Acts.[17]

C. The Department of Interior's long-standing interpretation that the 1938 Act had no affect on the 1924 and 1927 taxing authorizations is entitled to deference.

After the taxing authorizations were enacted in 1924 and 1927, Montana and the amici states began imposing taxes on non-Indian severance from reservation land. *See, e.g., British-American Oil Producing Co. v. Board of Equalization of Montana,* 299 U.S. 159 (1936);[18] Laws of New Mexico, 1937, ch. 103, Sec. 1. Since enactment of the state severance taxes, the Department of Interior has been directly involved in the procedures by which the states have collected the taxes. *See, e.g.,* 58 Interior Dec. 535 (1943). As an accommodation to the producers, the Department of Interior authorized the producers

[17] The Ninth Circuit gave weight to the fact that there remain in effect after the 1938 Act no other sections of the 1924 Act other than the taxing provision. 729 F.2d at 1201. Thus the circuit court more readily found that the 1938 Act had impliedly repealed the remaining taxing authorization of the 1924 Act. If this consideration is entitled to any weight, the 1927 Act does not suffer the same infirmity. The taxing provision is not alone in surviving enactment of the 1938 Act. *E.g.,* 25 U.S.C. § 398d (1976) (Changes in Boundaries of Executive order reservations). Further, the fact that there are other sections of the 1927 Act with continued validity demonstrates that the 1924 Act taxing provision does not stand alone in the wake of the 1938 Act.

[18] Montana's taxes have been imposed and their collection sanctioned by the Department of the Interior since the early 1920's. *See British-American,* 101 Mont. 293, 54 P.2d 129, 131, *aff'd,* 299 U.S. 159.

to reduce the tribal royalties by the amount of state taxes paid. *Id.* Likewise, between May 11, 1938, and November 7, 1977, the Department of the Interior repeatedly recognized the states' authority to tax the tribal royalty share of mineral production on Indian lands.[19] In 1977, however, the Department reversed the earlier opinions, holding that the 1924 Act no longer authorized taxation of the royalty by the states. 84 Interior Dec. 906, 911 (1977). In 1979, that conclusion was applied to the 1927 Act as well. 86 Interior Dec. 181 (1979).

The interpretation of the Department of Interior and its longstanding recognition of the validity of state taxation during the approximately 40 years between the time the 1924 and 1927 Acts were passed and the time the interpretation was changed is entitled to great weight in determining congressional intent. *Watt v. Alaska; United States v. Clark,* 454 U.S. 555, 566 (1982). "[T]he construction of a statute by those charged with its administration is entitled to substantial deference," *United States v. Rutherford,* 442 U.S. 544, 553 (1979); *see also Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976), particularly where, as here, the agency proposed the act which it then construed. *Watt v. Alaska,* 451 U.S. at 273; *Miller v. Youakim,* 440 U.S. 125, 144 (1979); *see* H.R. Rep. No. 1872, 75th Cong., 3rd Sess. 1 (1938). Whether the informal opinions of the Department of the Interior are to be accorded the same weight as formal opinions is irrelevant because it is undisputed that between 1938 and 1977 the Department of the Interior

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[19] *See, e.g.,* Opinion of the Department of Interior, M-36246, "State Taxation of Tribal Royalty Interests in Oil and Gas Leases on Blackfeet Indian Reservation" (October 29, 1954); Opinion of the Department of Interior, M-36310, "Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana" (October 13, 1955); Opinion of the Department of Interior, M-36345, "State Production Taxes on Tribal Royalties from Leases other than Oil and Gas" (May 4, 1956).

actively participated in implementing the statutes which permitted state taxation demonstrating the Department of Interior's committment to the correctness of its interpretation that state taxation was permitted. Thus it is this interpretation which is "more indicative of congressional intent." *Rice v. Rehner,* __U.S.__, 103 S.Ct. 3291 (1983) ("[T]he early interpretation by the Bureau of Indian Affairs . . . is consistent with the view of [the bill's sponsor, and] is surely more indicative of congressional intent . . . ." *Id.* (at 3301, n.13).

Recently, the Department of Interior, Board of Land Appeals, returned to the original administrative interpretation by not only recognizing Arizona's right to tax tribal royalties but requiring that the state tax reimbursement received by the non-Indian severer from its buyer be added to the taxable value of the mineral for purposes of both the royalty and tax calculations. *In re Peabody Coal,* 72 I.B.L.A. 337 (1983). The Board of Land Appeals tacitly recognized the states' right to tax by requiring the reimbursement of the state taxes to be included in the gross amount upon which the royalty share was calculated. The temporary alteration in the Department of Interior's position between 1977 and 1983 during which the department opined that state taxation was not allowed is an aberration which should be given no weight.

The 1924 and 1927 Acts expressly authorize state production taxes on Indian lands. These acts have not been repealed either expressly or by implication. Thus this Court should find Montana's taxes are valid and authorized as a matter of law.

D. Should they be applied, the rules of statutory construction applicable to Indian issues do not support a finding that the 1938 Act repealed by implication the 1924 or 1927 Acts.

The taxing authorizations contained in the 1924 and 1927 Acts are clear and unambiguous, a result reached by the Ninth

Circuit in analyzing the 1924 Act. *Blackfeet Tribe of Indians v. State of Montana,* 729 F.2d 1192, 1200 (9th Cir.) *pet. for cert. granted,* 53 U.S.L.W. 3203 (Oct. 1, 1984). But the Ninth Circuit then held, invoking assorted canons of statutory construction, that the 1938 Act superseded the explicit taxing authorizations. *Id.* at 1203. This conclusion was premised in part upon the Ninth Circuit's use of the I.R.A. to create an ambiguity in the otherwise clear 1924 and 1927 Acts which the court then resolved against the state on the basis of the canon of construction mandating liberal construction of ambiguities in favor of Indians. Such use of this canon of construction is unwarranted and unprecedented, as is employing the I.R.A. to create an ambiguity where none exists.

In the interpretation of statutes concerning Indians, where a statute is ambiguous, the ambiguity is to be resolved in favor of the Indians.[20] *Andrus v. Glover Construction Co.,* 446 U.S. 608 (1980). This rule applies only where an ambiguity exists and is inappropriate where the statute is clear on its face:

> We give this rule [resolving ambiguities in favor of Indians] the broadest possible scope, but

[20] States may tax non-Indian activities which occur on trust land, *Thomas v. Gay,* 169 U.S. 264 (1898), *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), as long as the state tax is not imposed upon the tribe or one of its members and does not create a liability against tribal property. *Id.* Montana asserts that the legal incidence of its severance taxes is placed upon the non-Indian producer who extracts oil and gas from the Blackfeet Reservation. The amici states also impose a variety of severance and ad valorem taxes upon non-Indian extraction from reservation land. The legal incidence of these taxes also falls upon the non-Indian producer. *E.g.,* N.M. Stat. Ann. § 7-29-4 (1978). It is the non-Indian who is ultimately obligated to pay the tax and against whom the states will seek recourse if payment is not made. Because the legal obligation to pay these severance taxes is placed upon the non-Indian, the interpretation of the statutes at issue does not involve the interpretation of an Indian question.

> it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

Rice v. Rehner, 103 S.Ct. at 3302 (quoting *DeCoteau v. District County Court,* 420 U.S. 425, 447 (1975)). Because the taxing authorizations contained in the 1924 and 1927 Acts are explicit and unambiguous, there is no reason or justification for resorting to the rules of statutory construction: the language is clear and must be accorded its explicit meaning. *Id.*

The Ninth Circuit, in basing its opinion upon the policies underlying the I.R.A., sought to create an ambiguity in the otherwise unambiguous 1924 and 1927 Acts. Once having found the statutes ambiguous based on the policies underlying the I.R.A., the Ninth Circuit then used the Indian canon of statutory construction to transform the well-established rule that implied repeals are disfavored into a test of whether the 1938 Act expressly incorporated the earlier unambiguous taxing authorizations. There is no authority for changing the inquiry from the issue of implied repeal to that of express incorporation.

The I.R.A. represented a shift from the policies of assimilation embodied in the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388, 17 Cong. Rec. 1630-35 (1886), to a policy of Indian ownership and sovereignty. But the I.R.A. did not change the policy in the 1924 and 1927 Acts of encouraging Indian economic development and self-determination. Those Acts permitted longer and therefore more economically feasible mineral leases and required tribal approval of the leases. Nor did the I.R.A., in broadly and generally setting out Congress' change of emphasis in its relationship with Indian tribes, provide any basis for ignoring well-established rules of statutory construction. *Southern California Edison Co. v. Rice,* 685 F.2d

354 (9th Cir. 1982), *cert. denied,* __U.S.__, 103 S.Ct. 1497 (1983) ("Although United States policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made, the fact that Congress has not amended or repealed [the act in question] shows that the position of Indian allottees . . . has not changed." 685 F.2d at 356 (citations and footnote omitted)); *accord Yellowfish v. City of Stillwater,* 691 F.2d 926 (10th Cir. 1982), *cert. denied,* __U.S. __, 103 S.Ct. 2087 (1983), and *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians,* __U.S.__, 104 S.Ct. 2105 (1984).

The taxing authorizations in the 1924 and 1927 Acts permit state taxation of the royalties paid to the tribe on non-Indian severance from Indian land. The policies underlying the I.R.A. do not create any ambiguity in the earlier, unambiguous statutes and there is thus no justification for applying the rule of statutory construction. The inquiry properly focuses on whether the 1938 Act implicitly repealed the 1924 and 1927 Acts, which it did not, not whether, in interpreting the 1938 Act liberally in favor of the Indians, that Act must itself include a specific authorization of state taxation. *Blackfeet,* 729 F.2d at 1206 (Anderson, J., dissenting). Thus because the 1938 Act did not repeal the earlier taxing authorizations, Montana's taxes are valid.

POINT II

STATES SHOULD BE PERMITTED TO IMPOSE THEIR SEVERANCE TAXES ON PRODUCTION FROM RESERVATION LAND BECAUSE OF THE SERVICES THE STATES PROVIDE TO NON-INDIAN SEVERERS, TRIBES AND TRIBAL MEMBERS.

Montana and the amici states provide significant services to the non-Indian producers operating on reservations, to the tribes and to members of the tribes. These services are provided

even though Indian reservations encompass land which is separate from state land and subject to the separate sovereignty of the tribes. Services are paid for in part by receipts from severance tax collections.[21] While it is difficult if not impossible to determine specific dollar amounts of the services provided to tribes, individual Indians, or reservation residents, it is possible to identify some of the services provided by the states to all of their citizens, including reservation Indians.

In taxing non-Indian severance taking place on reservation land, the states are "assess[ing] taxes in return for governmental functions [they] perform[ ] for those on whom the taxes fall." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 150 (1980). Thus the states have more than "a general desire to raise revenue"; the states provide services that "justif[y] the assertion of taxes imposed for on-reservation operations. . . ." *Id.*

Increased development of energy resources inevitably imposes significant costs on the states in which the development occurs, including both those directly resulting from the increased mining activities and those indirectly associated with increased development.

Mining activities directly affect state expenditures in many different areas. The environmental impacts of mining do not stop at reservation boundaries. Ground and surface water pollution, air pollution and solid waste disposal may all have substantial impacts on land outside the reservation even though the mining occurs within the reservation. These effects are direct results of the non-Indian mining activities. Each state has detailed systems for monitoring, controlling and regulating such environmental impacts. On-site inspections of mining

21 *See* Western Governor's Regional Energy Policy Office, Financial Strategies for Alleviation of Socioeconomic Impacts in Seven Western States, at p. 83 (1977).

operations, compliance with environmental standards and reclamation activities are costs which each state bears regardless of the location of the land upon which the activity takes place.

Energy development increases the need for construction of new state roads and maintenance of existing ones both on and off the reservation. Minerals extracted from the reservation do not remain there. They must be transported through the state in heavy trucks which damage roads. State roads are often required to open remote areas for new development and state funded roads provide the means for moving workers to mines and wells and mineral products to points of consumption.[22]

Energy development often generates whole new towns in formerly rural areas or new growth in existing towns and cities. The impact of new workers in rural areas dramatically increases the need for public and private facilities including schools, utilities, police and fire protection, recreation and health facilities, streets, sewers, and water systems, and requires substantially increased state funding.

States also bear the indirect costs of mineral extraction by establishing the regulatory framework for providing services to all of their citizens. Residents of the reservation and members of tribes are included as recipients of these services. State commissions regulate utility rates, protecting Indian and non-Indian consumers; insurance commissions regulate rates charged by insurance companies for Indian and non-Indian citizens; and

[22] This case should be distinguished from the situation presented in *White Mountain Apache Tribe v. Bracker*, where the roads which the state sought to maintain with the questioned tax were Bureau of Indian Affairs or tribally maintained. Although the state attempted to justify its tax as being dedicated to maintaining the same roads, this Court invalidated the tax because the state was "unable to identify any regulatory function or service performed . . . that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] and tribal roads within the reservation." 448 U.S. at 148-149.

corporation commissions regulate corporate activity throughout the states. Other state agencies, such as the state attorney general's office, protect citizens from consumer abuse, unfair practices and anti-trust violations, the beneficial effects of which are enjoyed by all. Various licensing agencies for attorneys, doctors, dentists, chiropractors, veterinarians, barbers, architects, private investigators as well as many other licensed groups, regulate and protect Indians and non-Indians alike throughout the state.

Education expenses consume a large part of most state budgets. Although Indian tribes receive a substantial amount of federal money to establish and maintain their school systems, state and local governments assure adequate financial resources when federal tax dollars fail to meet the reservations' needs. *E.g., Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (1975) ("Indian children are entitled to attend state public schools, even though Indian or federal schools might also be available in the same district." 543 P.2d at 1184); *Grant v. Michaels*, 94 Mont. 452, 23 P.2d 266 (1933). Additionally, state funded universities, colleges, junior colleges, branch colleges, and post-secondary trade schools are available at reduced tuition to all state residents.

States finance portions of low income benefits including welfare and food stamps. In these federal low income programs, states pay the costs of administering the programs and a certain percentage of the actual benefits to on and off reservation recipients. Many other social services are provided by various states to tribes and their members, including health planning and immunization programs, tuberculosis control, alcoholism and drug prevention and treatment programs. Also, in certain states, low income food, medical and energy tax rebates are available to all citizens regardless of payment of any income taxes. *See, e.g.*, N.M. Stat. Ann. §§ 7-2-14 and 7-2-14.1 (1978).

In many of these circumstances, Indian tribes receive substantial federal assistance, both monetary and otherwise, to operate the programs. But even where federal money is available, the states act to insure that minimum funding levels are met. For example, in education, if federal assistance is not adequate to reach a minimum funding level, the states contribute the money necessary to reach that minimum, whether the state money represents one percent of the total required or one hundred percent. This role as guarantor of adequate funding is becoming increasingly important in light of the substantial cuts in the federal budget for services to reservations, particularly in the areas of Indian health services and education programs. The states will be increasingly called upon to fill the gaps in the federal funding.

Each of these services is provided to Indians and non-Indians alike whether residing on or off reservation. Certainly energy related development increases the costs to the states. While the attendant increase in taxes derived from the economic activity may ultimately offset some of these increased costs, many of the benefits and services financed from state tax receipts are not quantifiable: there is no dollar for dollar relationship between tax dollars received from one individual and benefits paid by the state to that individual. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1941). One of the tenets of taxation is that the benefits of publicly funded projects will often accrue to persons and organizations who did not pay the costs. In energy rich states, areas of the state possessing the resources will pay a greater proportion to the state coffers for funding services provided to other areas which lack resources regardless of whether the tax generating activity or the use of the services occurs on or off reservation land. This is what taxation by a sovereign is intended to and does achieve. The states are providing through their systems of taxation the "only benefit to which [a taxpayer] is constitutionally entitled . . .[:] that derived from [ ] enjoyment of the privileges of living in an

organized society, estblished and safeguarded by devotion of taxes to public purposes." *Commonwealth Edison v. State of Montana*, 453 U.S. 609, 629 (1981) (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937)). The costs associated with the provision of benefits and services are indivisible: they are the instrument through which the quality of life is increased for society as a whole. The states use their receipts from tax collections to finance benefits to their citizens to improve their lives, and the states should be permitted to continue to collect their severance taxes to continue to provide the services to all.

POINT III

THE ONLY QUESTION PRESENTED IN THIS CASE IS THE VALIDITY OF STATE TAXATION OF INDIAN ROYALTIES: STATE TAXATION OF NON-INDIAN PRODUCTION IS NOT AT ISSUE AND PRESENTS A QUESTION SEPARATE FROM THE VALIDITY OF THE TAX ON TRIBAL ROYALTIES.

The 1924 and 1927 Acts authorize state taxation of both non-Indian severing activities and the royalties received by the tribes. Of the amici states, New Mexico and Utah do not impose their taxes on the royalty share; severance taxes paid to these states are calculated after the deduction of the tribal royalties.[23] Arizona, pursuant to the holding of its Supreme Court in *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130,

[23] New Mexico's statutes permit the state to tax the royalty "to the extent authorized or permitted by law." *E.g.*, N.M. Stat. Ann. § 7-29-4B (1978). New Mexico collected its taxes on the royalty share under the original administrative interpretations of the solicitor which recognized the states' authority to tax the royalties. However, when the solicitor reversed this long-standing administrative interpretation in 1977, New Mexico ceased calculation of its severance taxes prior to deduction of the royalty share.

387 P.2d 1013 (1963), has collected its taxes from the royalty share as well as from the non-Indian producers.

The issue presented in this case is a narrow one: can Montana, under the authority of the 1924 Act, impose its taxes on the Blackfeet Tribe's royalty share? The tribe, the state and the Ninth Circuit have each specifically limited the issue to the validity of taxes falling on the royalty share.[24]

Should this court uphold the Ninth Circuit decision, the amici states respectfully request that this Court address only that question and not address the validity of the remaining portions of the 1924 or 1927 Acts concerning the validity of state severance taxes imposed on non-Indian producers. Invalidation of the tax on the royalty share does not automatically invalidate the provisions allowing for state taxation of the non-Indian producers: the authorization of state royalty taxation is a wholly separate question from that of state taxation of non-indian production. State taxation of the tribe or its property is absolutely prohibited except when a congressional enactment permits the tax. State taxation of non-Indian activities, however, is not absolutely prohibited. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Thomas v. Gay*, 169 U.S. 264 (1898).

The Ninth Circuit held that the I.R.A. represented a shift in congressional Indian policy which was incorporated in the 1938 Act. 729 F.2d at 1194. The court then held that the general repealer in the 1938 Act demonstrated Congress' intent to repeal the earlier taxing authorizations which the court held

[24] The Ninth Circuit remanded this case for a determination of whether the state imposed its severance taxes on the tribal royalty. Implicit in this remand is the court's decision that state taxation of the royalties presents a different issue from state taxation of the non-Indian production. The amici states agree that these issues are different and should be treated differently.

were in conflict with the policies of the I.R.A. One of the purposes of the 1938 Act was to bring leasing procedures under that Act into harmony with the policies of the I.R.A. H.R. Rep. No. 1872 at 3. The general repealer clause, Section 7 of the 1938 Act, does apply to inconsistent acts or parts of acts. If, however, as the Ninth Circuit held, the I.R.A.'s policies apply the 1938 Act's general repealer to the 1924 Act, then only those provisions of the 1924 Act which are inconsistent with the I.R.A.'s policies are repealed. The only possibly inconsistent portion of the 1924 Act is that permitting state taxation of the royalty share.[25] State taxation of non-Indian severance in no manner affects, and certainly does not defeat, the goals of the I.R.A. If there is any adverse implication from state taxation it only occurs with regard to taxation of the tribal royalty share. Thus, only state taxation of the royalty share should be excised if this Court applies the analysis of the Ninth Circuit.

CONCLUSION

The amici states assert the continuing validity of the taxing authorizations contained in the 1924 and 1927 Acts. Whether states may tax the tribal royalty is a question separate from the validity of state taxation of non-Indian severance even though the 1924 and 1927 Acts authorize state taxation of both. Should this Court hold those authorizations inapplicable,

[25] The position of the amici states is that neither the tax on the non-Indian severance nor the tax on the royalty share conflicts with the 1938 Act. This position is discussed in detail in Points I and II above. Should this Court disagree, however, and uphold the Ninth Circuit's analysis which employs the I.R.A. policies to find an implied repeal, then the scope of that repeal should be limited to only the tax on the royalty share.

amici respectfully request that the holding be limited to the only question presented, that of the validity of the tax on the tribal royalty.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 1984, I, Paula Forney-Thompson, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Brief of the States of New Mexico, Arizona, Alaska, California, Idaho, Utah and Wyoming as Amici Curiae in Support of the State of Montana, to the following counsel of record:

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No. 83-2161

In the Supreme Court

OF THE

United States

October Term, 1984

State of Montana, et al.,
Petitioners,

vs.

Blackfeet Indian Tribe,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE STATE OF MONTANA

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No. 83-2161

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AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE STATE OF MONTANA

INTEREST OF AMICUS CURIAE

The State of California on behalf of the California State Board of Equalization submits this brief pursuant to Rule 36 as amicus curiae in support of appellee the State of Montana. Rule 36.4 provides that California is not required to obtain the consent of the parties to file an amicus curiae brief.

This case is of interest to California because this Court's decision may affect the validity of certain California taxes imposed on non-Indians engaged in commercial activity with Indian tribes and tribal members.

SUMMARY OF ARGUMENT

California imposes the property tax on possessory interests in real property that is itself exempt from the property tax and a timber yield tax on the ownership of felled

timber. The taxes are imposed on non-Indians who have lease interests in Indian trust lands or who purchase Indian timber. The revenues from both taxes are used to fund government services provided to reservation Indians; in this respect the taxes differ from the taxes invalidated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

The only issue in this case is the correctness of the Ninth Circuit's ruling that Montana's severance tax may be applied to Indian royalties received under 1924 Act leases but not Indian royalties received under 1938 Act leases. Since the California taxes are not imposed on Indians and are not claimed to be valid under either the 1924 Act or the 1938 Act, the decision in this case need not include a discussion of the validity of taxes such as the California taxes. Instead, given the importance of such taxes to the states and the substantial arguments to be made in favor of their validity, this Court should refrain from a broadly worded decision in this case and instead should defer their consideration until a case is before this Court in which the issue is directly presented and the facts and arguments have been fully developed.

ARGUMENT

California, unlike Montana and the other amici states, does not have a mineral severance tax, and little if any Indian trust land in California is subject to mineral leases executed under the 1924 and 1938 Acts.[1] Whether Indian

[1]A bill proposing a tax on mineral royalties is now pending in the California Legislature.

mineral royalties from such leases may be taxed by the states is therefore not a matter of direct present concern to California.

However, California is concerned that a broadly worded decision on the narrow question of the proper interpretation of the 1924 and 1938 Acts may touch upon a different issue which is of more general importance, i.e., the right of a state to impose a tax upon a non-Indian engaged in commercial activity with an Indian tribe if the revenue from the tax does not directly support the taxed activity but nevertheless funds services which are used by the tribe and tribal members.

It has been argued that two recent decisions of this Court, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), cast doubt upon the validity of such taxes. However, as is discussed below in more detail, *White Mountain* and *Ramah* each involved a state tax whose revenues did not benefit the Indian tribe which bore the ultimate economic burden of the tax. California therefore submits that the validity of a tax whose revenues do benefit the tribe affected by the tax is a controversy which this Court has not yet been called upon to confront directly.

There is no reason why this Court, in deciding a narrow question about the legislative intent behind the enactment of the 1938 Act, should also deal with the separate issue of the right of a state to tax in return for services rendered. Instead, such a discussion should await a case in which the issue is squarely confronted, thereby ensuring that the facts will be fully developed in the record on appeal and the

arguments fully briefed. Such an opportunity may be presented in a case now pending in the United States District Court for the Northern District of California, involving a Supremacy Clause challenge to the validity of the California timber tax. *Hoopa Valley Tribe, et al. v. Nevins* (N.D. Ca. No. C 82 5903 MHP).

The remainder of this brief describes in more detail the California property tax and timber yield tax as applied to Indian leases and timber and shows that there is a legitimate dispute about the appositeness of *White Mountain* and *Ramah*. Since this brief is not intended to persuade this Court to resolve the dispute, no attempt has been made to present a complete discussion of the pertinent facts and authorities.

The California *ad valorem* property tax is levied by the various California counties on all property within their respective jurisdictions and constitutes a principal source of revenue for county mandatory and discretionary expenditures. Among the properties subject to the property tax are possessory interests, which include lease interests in real property if the real property itself is exempt. A number of California counties impose the property tax on possessory interests in Indian trust land. On two occasions the Ninth Circuit has held that such possessory interests do not share the immunity from the state taxation of the Indian trust land itself. *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), involving a hotel lease; *Fort Mojave Tribe v. San Bernardino County* 543 F.2d 1253 (9th Cir. 1976) involving economic development leases. Although the legal incidence of the tax falls upon the non-Indian leasee, the

Ninth Circuit has recognized that the imposition of the tax "had an economic effect on the Indian lessor." *Ft. Mojave Tribe, supra* at 1256.

The California timber yield tax law (Cal. Rev. & Tax. Code § 38101 et seq.), which came into effect in 1977, resulted from the Legislature's awareness that the application of the property tax to standing timber on private lands and to possessory interests in standing timber on exempt lands, including Indian trust lands, encouraged premature harvests and otherwise was a substantial disincentive to the maximization of California's timber resources. The timber yield tax law eliminates the property tax as applied to timber and instead imposes a tax on the owner of felled timber. If the owner is exempt from taxation under federal or state law, such as an Indian tribe, the tax is imposed on the first non-exempt person to obtain title to the timber. The tax is administered by the California State Board of Equalization, which collects and then distributes the revenues among the counties, each county receiving the amount of revenue generated within its boundaries.

The validity of the timber yield tax as applied to Indian timber is at issue in *Hoopa Valley Tribe, supra,* now pending in the Northern District of California. The reservation of plaintiff the Hoopa Valley Tribe is located in Humboldt County in Northern California. The reservation is heavily wooded, and timber is the principal source of tribal revenue. Although the Bureau of Indian Affairs ("BIA") has exclusive management jurisdiction over tribal timber resources, the state and county expenditures for such services as schools, roads, welfare and police enhance

nearly every other aspect of life on the reservation. The total annual cost of these services allocable to tribal members living on the reservation exceeds, at a conservative estimate, at least $1,500,000 a year. This amount is roughly the same, if not more than, federal expenditures for the tribe and tribal members and far exceeds the approximately $147,000 a year in timber yield tax revenue received from the non-Indian purchasers of Hoopa timber. Since the reservation is immune from the property tax and tribal members are immune from state taxation on reservation-generated revenue, the timber yield tax provides the only source of government revenue derived from the reservation sources.

On July 19, 1984, Judge Marilyn Hall Patel granted the tribe's motion for partial summary judgment against defendant the California State Board of Equalization. The judgment when entered will be appealed.

Judge Patel concluded that the California timber yield tax could not survive the preemption analysis mandated by this Court in *White Mountain* and *Ramah*. Although there is no court action now pending concerning the constitutionality of the counties' taxation of non-timber possessory interests in Indian trust land, if such an action is brought, the plaintiff presumably will likewise rely upon these decisions.

Since this brief, as noted above, has a limited scope, the following is only a summary of the arguments California will make to the Ninth Circuit in the *Hoopa Valley Tribe* appeal concerning *White Mountain* and *Ramah*.

White Mountain arose out of logging operations conducted on the Fort Apache reservation in Arizona. The

Apache Tribe contracted out the harvest of tribal timber to Pinetop, a non-Indian logging company. Arizona imposed two taxes on Pinetop—a motor license tax and a use fuel tax. This Court explicitly recognized that revenues from the use tax were used to compensate Arizona for the use of its highways. (*White Mountain, supra* at 139.) Although the decision does not describe the purpose of the license tax, Arizona law is clear that revenues from the license tax may be expended only for purposes relating to the state road systems. (Arizona Const. Art. 9, sec. 14; Arizona Rev. Stats. 28-1550 et seq.)

There were three types of roads on the reservation: state roads, BIA roads and tribal roads. Arizona conceded that the taxes could not be imposed on Pinetop's use of tribal roads, and the Apache tribe did not contest the imposition of the tax on Pinetop's use of state roads. Thus, the sole issue before this Court was whether taxes used to fund state roads could be imposed on the use of roads which were maintained not by Arizona but by BIA.

The Supreme Court's analysis consisted of the balancing test—"a particularized inquiry into the nature of the state, federal and private interests at stake." (*Supra* at 145.) The inquiry led to the conclusion that there was no significant state interest because Arizona was attempting to tax for the use of a service—public roads—which it did not provide:

> "As noted above, this is not a case in which the state seeks to assess taxes in return for governmental functions it performs for those upon whom the taxes fall.
>
> "And, equally important, respondents have been unable to identify any regulatory function for services performed by the state that would justify the assess-

ment of taxes for activities on Bureau or tribal roads within the reservation. . . . Though at least the use fuel tax purports to compensate the state for the use of its highways (citation omitted), no such compensatory purpose is present here. The roads at issue have been built, maintained and policed exclusively by the federal government, the tribe and its contractors." (*Supra*, at 148-50.)

Ramah also involved a situation in which a state was attempting to tax for services which it did not provide. In 1968 New Mexico closed the only public high school available to students residing on the reservation of the Ramah Navajo Tribe, which consequently was forced to obtain congressional funding to build a high school on the reservation for the education of its children. The Tribe entered into a contract for construction of the high school with a non-Indian contractor. New Mexico taxed the gross receipts of the contractor attributable to the contract.

Using the balancing test among federal, state and tribal interests mandated by *White Mountain*, the Supreme Court held against the imposition of tax:

> "In this case, the state does not seek to assess its tax in *return for the governmental function it provides to those who must bear the burden of paying the tax.* Having declined to take any responsibility for the education of these Indian children, the state is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has 'left the state with no duties or responsibilities.'" (*Supra*, at 843. Emphasis added.)

But the tax would have been upheld if New Mexico had not closed the high school:

> "This case would be different if the state were actively seeking tax revenues for the purpose of construction, or assisting in the efforts to provide adequate educational facilities for Ramah Navajo children." (*Supra*, at 843, Fn. 7.)

The California property tax and timber yield tax are completely different from the taxes invalidated in *White Mountain* and *Ramah*. The California taxes, unlike the Arizona license and use taxes, are general fund taxes whose revenues fund services provided to tribal members. California, unlike New Mexico in *Ramah*, has not abdicated its responsibilities to tribal members; the services enhance nearly every aspect of reservation life.

In *Ramah*, this Court was unpersuaded by New Mexico's argument that, although education services had been withdrawn, the tax was justified by the existence of other government services unrelated to education. (*Ramah*, *supra*, at 845, fn. 10.) This Court observed that New Mexico's evidence was "far from clear" because some state services were funded by the federal government and because in any event New Mexico had saved approximately $380,000 by not educating Tribal children.

The considerations which led this Court to reject New Mexico's argument will not apply to California's defense of its taxes. California has not withheld any services from any Indians who instead receive all services available to non-Indians. The record before the court in *Hoopa v. Nevins* establishes that the cost of the various government services provided to members of the Hoopa Tribe is at least $1,500,000 a year, or more than ten times the revenues from the yield tax.

Since the amount of revenue collected from other California taxes which are either imposed or have an economic

effect on the Hoopa Tribe or its members is *de minimus*, the yield tax is the only tax which compensates California for even a small portion of the cost of the services which it provides to Tribal members living on the reservation.

CONCLUSION

This Court should limit its discussion in this case to the only issue decided by the Ninth Circuit—the taxation by Montana of Indian royalties paid under leases executed pursuant to the 1924 and 1938 Acts. California accordingly requests this Court not to issue a broadly worded decision which might touch upon the validity of state taxes such as the California property tax on possessory interests and the timber yield tax. This Court should instead defer a discussion of such taxes to a case in which the pertinent facts and arguments have been fully developed and briefed.

Respectfully submitted,
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No. 83-2161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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CHRONOLOGICAL LIST OF

RELEVANT DOCKET ENTRIES

NOTE: "Tribe" refers to the Blackfeet Tribe of Indians.

"State" refers to the State of Montana and the Director of the Montana Department of Revenue.

"Glacier" refers to Glacier County, Montana.

"Pondera" refers to Pondera County, Montana.

Docket Number	Date	Description of Docket Entry
1	10/27/78	Tribe's Complaint
12	1/24/79	Tribe's First Amended Complaint

Docket Number	Date	Description of Docket Entry
18	2/9/79	Glacier's Motion to Dismiss and for Order Requiring Plaintiff to Pay Glacier Costs and Attorney's fees
19	2/23/79	Pondera's Motion to Dismiss and for an Order Requiring Plaintiff to Pay Pondera's Costs and Attorney's Fees
20	2/23/79	Montana's Answer to First Amended Complaint
23	3/9/79	Pondera's Answer to First Amended Complaint

Docket Number	Date	Description of Docket Entry
27	4/16/79	Order Denying all Motions to Dismiss and Motions of Glacier and Pondera for an Award of Costs and Attorney's Fees
33	9/21/79	Glacier's Answer to First Amended Complaint
52	2/20/80	Tribe's Motion for Partial Summary Judgment and Supporting Brief
64	5/6/80	Montana's Motion for Summary Judgment

Docket Number	Date	Description of Docket Entry
65	5/6/80	Montana's Brief in Support of Motion for Summary Judgment and in Opposition to Tribe's Motion for Summary Judgment
66	5/15/80	Pondera's Motion for Summary Judgment
67	5/15/80	Pondera's Brief in Support of Motion for Summary Judgment and in Opposition to Tribe's Motion for Summary Judgment

Docket Number	Date	Description of Docket Entry
70	7/18/80	Tribe's Reply Brief on Tribe's Motion for Partial Summary Judgment and Reply Brief to Defendants' Motion for Summary Judgment
73	8/15/80	State's Reply Brief in Support of Motion for Summary Judgment
74	8/18/80	Pondera's Reply Brief in Support of Motion for Summary Judgment
75	1/6/81	Court's Memorandum Opinion
76	1/6/81	Order granting Defendants' Motion for Summary Judgment

Docket Number	Date	Description of Docket Entry
77	1/6/81	Filed and entered Summary Judgment in favor of Defendants and against Tribe
78	1/16/81	Tribe's Notice of Appeal

PROCEEDINGS IN NINTH CIRCUIT COURT OF APPEALS

Date	Description of Docket Entry
2/3/82	Case argued and submitted
12/14/82	Opinion affirming District Court
12/14/82	Filed and entered Judgment
12/27/82	Tribe's Petition for Rehearing with Suggestion for Rehearing En Banc
12/30/82	State's Motion to Modify Opinion

Date	Description of Docket Entry
1/10/83	Tribe's Opposition to State's Motion to Modify Opinion
6/22/83	Order that case be reheard by an en banc panel of the Court and withdrawing the previous 3-judge panel assignment
10/28/83	Motion of States of New Mexico and Arizona for Leave to File Their Joint Amicus Brief Out of Time
11/2/83	Tribe's Opposition to Motion for Leave to File Amicus Brief
11/10/83	Order granting states of New Mexico and Arizona leave to file their late Amicus Brief

Date	Description of Docket Entry
11/16/83	Case argued and submitted before *en banc* panel
4/3/84	Opinion affirming in part and reversing in part and remanding to District Court for further proceedings
4/3/84	Filed and entered Judgment

FIRST AMENDED COMPLAINT OF

BLACKFEET TRIBE OF INDIANS

This document appears as Appendix D, page 131 of the Appendix to the Petition for Certiorari. It is not reprinted here.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

No. CV-78-61-GF

THE BLACKFEET TRIBE OF INDIANS,)
)
Plaintiff,)
)
vs.)
)
STATE OF MONTANA, et al.,)
)
Defendants.)

DEFENDANTS STATE OF MONTANA AND DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants State of Montana and

Director of the Montana Department of Revenue answer the Plaintiff's First Amended Complaint (hereinafter "Complaint") as follows:

FIRST DEFENSE

1. The allegations contained in paragraph 1 are conclusions of law and require no answer.

2. Admit the allegations contained in paragraph 2.

3. Deny that William A. Groff is Director of Revenue of the State of Montana, and allege that Laury M. Lewis is the Acting Director of the Department of Revenue for the State of Montana. Defendants admit the remaining allegations contained in paragraph 3.

4. Admit the allegations contained in paragraphs 4, 5, and 6.

5. Admit the existence of 25 U.S.C. §398, and allege that the

statute speaks for itself; deny any allegations contained in paragraph 7 inconsistent with 25 U.S.C. §398.

6. Admit the existence of 25 U.S.C. §397, and allege that the statute speaks for itself; deny any allegations contained in paragraph 8 inconsistent with 25 U.S.C. §397.

7. Admit the allegations of paragraph 9 quoting 25 U.C.S. (sic) §396(a).

8. Admit the existence of R.C.M. 1947, §84-2202, and allege that the statute speaks for itself; deny any allegations contained in paragraph 10 inconsistent with R.C.M. 1947, §84-2202.

9. Admit the existence of R.C.M. 1947, §84-2202, and allege that the statute speaks for itself; deny all allegations contained in paragraph 11

inconsistent with R.C.M. 1947, §84-2202.

10. Admit the existence of Chapter 62 of Title 84, R.C.M. 1947, and allege that the statutes speak for themselves; deny all allegations contained in paragraph 12 inconsistent with that Chapter.

11. Admit the existence of Chapter 70 of Title 84, R.C.M. 1947, and allege that the statutes speak for themselves; deny all allegations contained in paragraph 13 inconsistent with that Chapter.

12. Admit the existence of R.C.M. 1947, §60-145, and allege that the statute speaks for itself; deny any allegations contained in paragraph 14 inconsistent with that statute.

13. Admit the existence of the Treaty with the Blackfeet of October

17, 1855, and allege that the Treaty speaks for itself; deny any allegations contained in paragraph 15 inconsistent with that Treaty.

14. Admit the existence of the Agreement of May 1, 1888 (25 Stat. 113); deny any allegations contained in paragraph 16 inconsistent with that Agreement.

15. Admit the existence of the Agreement of September 26, 1896, (29 Stat. 350); deny any allegations contained in paragraph 17 inconsistent with that Agreement.

16. Admit the existence of the Treaty with the Blackfeet of October 17, 1855, the Organic Act for the Territory of Montana, the Enabling Act of 1889, the 1889 Montana Constitution, and the 1972 Montana Constitution, and allege that those documents speak for

themselves; deny all allegations contained in paragraph 18 inconsistent with those documents.

17. Deny that the 1938 Indian Mineral Leasing Act (25 U.S.C. §396) replaced and supplanted the 1891 Indian Mineral Leasing Act (25 U.S.C. §397); admit that the 1924 Act (25 U.S.C. §398) granted states the right to tax the royalty interest of Indian tribes in mineral leases of land owned by the United States Government and held in trust for the Indian tribes; deny that the 1924 Act applied only to leases granted under the 1891 Act (25 U.S.C. §397); deny the allegations that no congressional consent had been given to Defendants to tax royalty from leases granted under the 1939 Act.

18. Admit the existence of the opinion of the Solicitor of the United

States Department of Interior dated November 7, 1977; deny the validity of the conclusions reached by that opinion, and allege that the opinion is inconsistent with prior opinions of the Solicitor of the United States Department of Interior.

19. Deny the allegations of paragraph 21.

20. Admit the legal title to part of Plaintiff's royalty interest is in the federal government, but allege that Defendants lack knowledge as to whether or not all of Plaintiff's royalty interest is so held. Defendants deny all other allegations contained in paragraph 22.

21. Defendants deny the allegations contained in paragraphs 23 through 27.

SECOND DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

Plaintiff has failed to name as a party to this action the United States of America which holds legal title to the royalty interest alleged to have been taxed by the State of Montana, the Bureau of Indian Affairs and the United States Geological Survey which administer Plaintiff's royalty.

FOURTH DEFENSE

Plaintiff has failed to name as parties to this action the producers of oil and gas in which Plaintiff has a royalty interest. Plaintiff seeks refund of taxes which were paid by said producers who filed returns and paid taxes to the State of Montana without

claiming that Plaintiff's royalty was exempt or immune from such taxes.

WHEREFORE Defendants State of Montana and Director of the Montana Department of Revenue pray:

1. That Defendants be granted judgment in their favor.

2. That Plaintiff take nothing by its complaint.

3. That Defendants be awarded their costs herein.

4. That Defendants be granted such further relief as the court may deem just and equitable.

DATED this 23d day of February, 1979.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
GREAT FALLS DIVISION

No. CV-78-61-GF

THE BLACKFEET TRIBE OF INDIANS)
Blackfeet Indian Reservation)
Browning, Montana 59417)
)
Plaintiff,)
)
vs.)
)
WILLIAM A. GROFF)
Director, Montana Department of)
Revenue; Capitol Building,)
Helena, Montana 59601)
)
STATE OF MONTANA)
Governor's Office)
Capitol Building)
Helena, Montana 59601)
)
GLACIER COUNTY, MONTANA)
Court House)
Cut Bank, Montana 59427)
)
PONDERA COUNTY, MONTANA)
Court House)
Conrad, Montana 59425)
)
Defendants.)

ANSWER OF DEFENDANT,
PONDERA COUNTY, MONTANA

COMES NOW the defendant, PONDERA COUNTY, MONTANA, and for its answer to plaintiff's First Amended Complaint on file herein, admits and denies as follows:

FIRST DEFENSE

1. The allegations contained in paragraph 1 are conclusions of law and require no answer.

2. Admits the allegations contained in paragraph 2.

3. Denies that William A. Groff is Director of Revenue of the State of Montana, and alleges that Laury M. Lewis is the Acting Director of the Department of Revenue of the State of Montana. Defendant admits the remaining allegations contained in paragraph 3.

4. Denies the allegations

contained in paragraph 4.

5. Denies the allegations contained in paragraph 5.

6. Denies the allegations contained in paragraph 6.

7. Admits the existence of 25 U.S.C. §398, and alleges that the statute speaks for itself; denies any allegations contained in paragraph 7 inconsistent with 25 U.S.C. §398.

8. Admits the existence of 25 U.S.C. §397, and alleges that the statute speaks for itself; denies any allegations contained in paragraph 8 inconsistent with 25 U.S.C. §397.

9. Admits the allegation of paragraph 9 quoting 25 U.S.C. §396(a).

10. Admits the existence of R.C.M. 1947, §84-2202, and alleges that the statute speaks for itself; denies any allegations contained in paragraph 10

inconsistent with R.C.M. 1947, §84-2202.

11. Admits the existence of R.C.M. 1947, §84-2202, and alleges that the statute speaks for itself; denies all allegations contained in paragraph 11 inconsistent with R.C.M. 1947, §84-2202.

12. Admits the existence of Chapter 62 of Title 84, R.C.M. 1947, and alleges that the statutes speak for themselves; denies all allegations contained in paragraph 12 inconsistent with that Chapter.

13. Admits the existence of Chapter 70 of Title 84, R.C.M. 1947, and alleges that the statutes speak for themselves; denies all allegations contained in paragraph 13 inconsistent with that Chapter.

14. Admits the existence of R.C.M.

1947, §60-145, and alleges that the statute speaks for itself; denies any allegation contained in paragraph 14 inconsistent with that statute.

15. Admits the existence of the Treaty with the Blackfeet of October 17, 1885, and alleges that the Treaty speaks for itself; denies any allegations contained in paragraph 15 inconsistent with that Treaty.

16. Admits the existence of the Agreement of May 1, 1888 (25 Stat. 113); denies any allegations contained in paragraph 16 inconsistent with that Agreement.

17. Admits the existence of the Agreement of September 26, 1896 (29 Stat. 350); denies any allegations contained in paragraph 17 inconsistent with that Agreement.

18. Admits the existence of the

Treaty with the Blackfeet of October 17, 1855, the Organic Act for the Territory of Montana, the Enabling Act of 1889, the 1889 Montana Constitution, and the 1972 Montana Constitution, and alleges that those documents speak for themselves; denies all allegations contained in paragraph 18 inconsistent with those documents.

19. Denies that the 1938 Indian Mineral Leasing Act (25 U.S.C. §396) replaced and supplanted the 1891 Indian Mineral Leasing Act (25 U.S.C. §397); admits that the 1924 Act (25 U.S.C. §398) granted states the right to tax the royalty interest of Indian tribes in mineral leases of land owned by the United States Government and held in trust for the Indian tribes; denies that the 1924 Act applied only to leases granted under the 1891 Act (25

U.S.C. §397); denies the allegations that no congressional consent had been given to defendant to tax royalty from leases granted under the 1938 Act.

20. Admits the existence of the opinion of the Solicitor of the United States Department of Interior dated November 7, 1977; denies the validity of the conclusions reached by that opinion, and alleges that the opinion is inconsistent with prior opinions of the Solicitor of the United States Department of Interior.

21. Denies the allegations of paragraph 21.

22. Admits that legal title to part of plaintiff's royalty interest is in the federal government, but alleges that defendant lacks knowledge as to whether or not all of plaintiff's royalty interest is so held. Defendant

denies all other allegations contained in paragraph 22.

23-27. Defendant denies the allegations contained in paragraphs 23 through 27.

SECOND DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

Plaintiff has failed to name as a party to this action the United States of America which holds legal title to the royalty interest alleged to have been taxed by the State of Montana, the Bureau of Indian Affairs and the United States Geological Survey which administer plaintiff's royalty.

FOURTH DEFENSE

Plaintiff has failed to name as parties to this action the producers of

oil and gas in which plaintiff has a royalty interest. Plaintiff seeks refund of taxes which were paid by said producers who filed returns and paid taxes to the State of Montana without claiming that plaintiff's royalty was exempt or immune from such taxes.

WHEREFORE, defendant Pondera County, Montana, prays:

1. That defendant be granted judgment in its favor.

2. That plaintiff take nothing by its Complaint.

3. That defendant be awarded its costs herein.

4. That defendant be granted such further relief as the Court may deem just and equitable.

Dated this 7th day of March, 1979.

/s/ Douglas Anderson
DOUGLAS ANDERSON, Pondera
County Attorney
Attorney for Defendant,
Pondera County, Montana
416 S. Main Street
P. O. Box 576
Conrad, Montana 59425

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

No. CV-78-61-GF

THE BLACKFEET TRIBE OF INDIANS,)
Plaintiffs,)
-vs-)
STATE OF MONTANA, et al.,)
Defendants.)

DEFENDANT GLACIER COUNTY'S ANSWER
TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Glacier County answers the Plaintiff's First Amended Complaint (hereinafter "Complaint") as follows:

FIRST DEFENSE

1. The allegations contained in

paragraph 1 are conclusions of law and require no answer.

2. Denies the allegations contained in paragraph 2.

3. Denies that William A. Groff is Director of Revenue of the State of Montana, and alleges that Laury M. Lewis is the Acting Director of the Department of Revenue for the State of Montana. Defendant admits the remaining allegations contained in paragraph 3.

4. Admits the allegations contained in paragraphs 4, 5, and 6.

5. Admits the existence of 25 U.S.C. §398, and alleges that the statute speaks for itself; denies allegations contained in paragraph 7 inconsistent with 25 U.S.C. §398.

6. Admits the existence of 25 U.S.C. §397, and alleges that the

statute speaks for itself; denies any allegations contained in paragraph 8 inconsistent with 25 U.S.C. §397.

7. Admits the allegation of paragraph 9 quoting 25 U.S.C. §396(a).

8. Admits the existence of R.C.M. 1947, §84-2202, and alleges that the statute speaks for itself; denies any allegations contained in paragraph 10 inconsistent with R.C.M. 1947, §84-2202.

9. Admits the existence of R.C.M. 1947, §84-2202, and alleges that the statute speaks for itself; denies all allegations contianed in paragraph 11 inconsistent with R.C.M. 1947, §84-2202.

10. Admits the existence of Chapter 62 of title 84, R.C.M. 1947, and alleges that the statutes speak for themselves; denies all allegations

contained in paragraph 12 inconsistent with that Chapter.

11. Admits the existence of Chapter 70 of title 84, R.C.M. 1947, and alleges that the statutes speak for themselves; denies all allegations contained in paragraph 13 inconsistent with that Chapter.

12. Admits the existence of R.C.M. 1947, §60-145, and alleges that the statute speaks for itself; denies any allegations contained in paragraph 14 inconsistent with that statute.

13. Admits the existence of the Treaty with the Blackfeet of October 17, 1855, and alleges that the Treaty speaks for itself; denies any allegations contained in paragraph 15 inconsistent with that Treaty.

14. Admits the existence of the Agreement of May 1, 1888 (25 Stat.

113); denies any allegations contained in paragraph 16 inconsistent with that Agreement.

15. Admits the existence of the Agreement of September 26, 1896 (29 Stat. 350); denies any allegations contained in paragraph 17 inconsistent with that Agreement.

16. Admits the existence of the Treaty with the Blackfeet of October 17, 1855, the Organic act for the Territory of Montana, the Enabling Act of 1889, the 1889 Montana Constitution, and the 1972 Montana Constitution, and alleges that those documents speak for themselves; denies all allegations contained in paragraph 18 inconsistent with those documents.

17. Denies that the 1938 Indian Mineral Leasing Act (25 U.S.C. §396) replaced and supplanted the 1891 Indian

Mineral Leasing Act (25 U.S.C. §397); admits that the 1924 Act (25 U.S.C. §398) granted states the right to tax the royalty interest of Indian tribes in mineral leases of land owned by the United States government and held in trust for the Indian tribes; denies that the 1924 Act applied only to leases granted under the 1891 Act (25 U.S.C. §397); denies the allegations that no congressional consent had been given to Defendants to tax royalty from leases granted under the 1938 Act. Alleges that the United States of America, through the Secretary of the Interior and the other executives, officers, and employees of the United States Department of the Interior for a long period of time, beginning contemporaneously with the enactment of the 1938 Indian Mineral Leasing Act (25

U.S.C. §396) and continuing until November 7, 1977, has by a long, continuous, and uniform practical construction and interpretation in the course of official action, and by uniform administrative practice, interpreted and regarded the 1891 Indian Mineral Leasing Act (25 U.S.C. §397) and the 1924 Act (25 U.S.C §398) as being in full force and effect and as not having been repealed by the 1938 Indian Mineral Leasing Act (25 U.S.C. §396).

18. Admits the existence of a purported opinion of the Solicitor of the United States Department of Interior dated November 7, 1977; denies the validity of the conclusions reached by that opinion, and alleges that the opinion is inconsistent with prior opinions of the Solicitor of the United

States Department of Interior. Alleges that the United States of America, through the Secretary of the Interior and the other executives, officers, and employees of the United States Department of the Interior for a long period of time, beginning contemporaniously (sic) with the enactment of the 1938 Indian Mineral Leasing Act (25 U.S.C. §396) and continuing until November 7, 1977, has by a long, continuous and uniform practical construction and uniform interpretation in the course of official action, and by uniform administrative practice, interpreted and regarded the 1891 Indian Mineral Leasing Act (25 U.S.C. §397) and the 1924 Act (25 U.S.C. §398) as being in full force and effect and as not having been repealed by the 1938 Indian

Mineral Leasing Act (25 U.S.C. §396).

19. Denies the allegations of paragraph 21.

20. Admits that legal title to part of Plaintiff's royalty interest is in the federal government, but alleges that Defendant lacks knowledge as to whether or not all of Plaintiff's royalty interest is so held. Defendant denies all other allegations contained in paragraph 22.

21. Defendant denies the allegations contained in paragraphs 23 through 27.

SECOND DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

The United States of America has not been joined in this action and is a

party who must be joined in this action under Rule 19 in that the United States of America holds legal title to the lands, and the oil, gas and minerals in the lands, owned by it for the benefit of the Plaintiff and in the absence of the United States of America complete relief cannot be accorded among those already parties to this action, and the United States of America claims an interest relating to the subject of this action and is so situated that the disposition of the action in the absence of the United States of America may leave the Defendants who are already parties to this action subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations resulting from subsequent court actions by the United States of America involving the

question presented by this action.

FOURTH DEFENSE

Plaintiff has failed to name as parties to this action the producers of oil and gas in which Plaintiff has a royalty interest and who paid the taxes on Plaintiff's royalty from production as alleged in paragraph 23 of Plaintiff's First Amended Complaint, if, in fact, any such taxes were paid. Plaintiff seeks refund of such taxes which were paid by said producers who filed returns and paid such taxes without claiming the Plaintiff's royalty was exempt or immune from such taxes, or without indicating that, in fact, such taxes were levied upon or collected from Plaintiff's royalty.

FIFTH DEFENSE

That the Plaintiff has been guilty of laches and unreasonable delay in

bringing this action.

That if, in fact, the Defendant Glacier County levied and collected taxes on Plaintiff's royalty from production as alleged in paragraph 23 of Plaintiff's First Amended Complaint, such was done over a period of more than forty (40) years with the full knowledge, acquiescence and consent of the Plaintiff. That by the delay in bringing this action for such a period of time, and by acquiescing in and consenting to the levying and collection of such taxes, if any, the Plaintiff (a) allowed the Defendant Glacier County to include proceeds from such taxes as a part of its budgeted revenue and to budget such proceeds for county governmental purposes benefiting the Plaintiff and the tribal members of the Plaintiff; and, (b) allowed the

Defendant to expend the proceeds from the collection of such taxes for the benefit of the Plaintiff and its members in furnishing governmental services, educational facilities, and education to the Plaintiff and members of the Plaintiff tribe, all of which was to the prejudice of this Defendant and resulted in the unjust or wrongful enrichment of the Plaintiff and its tribal members.

WHEREFORE, Defendant Glacier County prays:

1. That Defendant be granted judgment in its favor.

2. That Plaintiff take nothing by its complaint.

3. That Defendant be awarded its costs herein.

4. That Defendant be granted such further relief as the court may deem

just and equitable.

DATED this 20th day of September, 1979.

Respectfully submitted,

FRISBEE, MOORE & STUFFT

By: <u>/s/ Selden S. Frisbee</u>
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MEMORANDUM OPINION, <u>Blackfeet Tribe of Indians v. Montana</u>, 507 F. Supp. 446 (D. Mont. 1981).

This document appears as Appendix C, page 103 of the Appendix to the Petition for Certiorari. It is not reprinted here.

OPINION, Blackfeet Tribe of Indians v. Groff, (unpublished) (9th Cir. 1982).

This document appears as Appendix B, page 70 of the Appendix to the Petition for Certiorari. It is not reprinted here.

OPINION, Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192 (9th Cir. 1984), on rehearing *en banc*.

This document appears as Appendix A, page 1 of the Appendix to the Petition for Certiorari. It is not reprinted here.

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ALEXANDER L. STEVAS,
CLERK

No. 83-2161

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the provision of the 1924 Indian Mineral Leasing Act, 25 U.S.C. §398 (1976), authorizing state taxation of oil and gas production on tribal lands applicable to leases made after the enactment of the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§396a-396g (1976)?

PARTIES TO THE PROCEEDING

The Petitioners are the State of Montana, the Director of the Montana Department of Revenue, Glacier County, Montana, and Pondera County, Montana.[1] The Respondent is the Blackfeet Tribe of Indians. All parties here were parties to the proceeding in the Ninth Circuit Court of Appeals.

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1 The Petitioners are collectively called "the State." Statements pertaining only to the Petitioner counties are noted.

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No. 83-2161

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

A three-judge panel of the Ninth Circuit Court of Appeals issued its original opinion on December 14, 1982. That unreported opinion is reproduced in the Appendix to the Petition for Certiorari (Pet. App. 70). On June 22, 1983, the Ninth Circuit ordered that the case be reheard _en banc_. 709 F.2d 521.

The en banc panel issued its opinion on April 3, 1984. That opinion is reported at 729 F.2d 1192 (9th Cir. 1984), and appears at Pet. App. 1. In this brief, all references to the opinion of the Ninth Circuit Court of Appeals are to this April 3, 1984, opinion. The opinion of the United States District Court for the District of Montana, issued by Judge Hatfield, 507 F. Supp. 446 (D. Mont. 1981), appears at Pet. App. 103.

JURISDICTION

The opinion of the en banc panel of the Court of Appeals for the Ninth Circuit was entered on April 3, 1984. The petition for a writ of certiorari was timely filed with this Court on June 29, 1984. This Court granted certiorari on October 1, 1984. The jurisdiction of

this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Federal Statutes.

The Act of February 28, 1891, 26 Stat. 795, codified at 25 U.S.C. §397 (Pet. App. 150).

The Act of June 30, 1919, 41 Stat. 3, 16, & 17, which provides in pertinent part as follows:

> ...the Secretary of the Interior is authorized to make allotments under existing laws within the said [Blackfeet] Reservation to any Indians of said Blackfeet Tribe not heretofore allotted....
>
> Provided further, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly:
>
> Provided, That the lands containing said minerals may be

> leased under such terms and conditions as the Secretary of the Interior may prescribe.

Section 26 of the Act of June 30, 1919, 41 Stat. 31, which provides in pertinent part as follows:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States or to any association of such persons or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming, heretofore withdrawn from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, which leases shall be irrevocable except as herein provided, but which may be declared null and void upon breach of any of their terms.

> That after the passage and approval of this section, unallotted lands, or such portion thereof as the Secretary of the Interior shall determine, within Indian reservations heretofore withheld from disposition under the mining laws may be declared by the Secretary of the Interior to be subject to exploration for the discovery of deposits of gold, silver, copper, and other valuable metalliferous minerals by citizens of the United States, and after such declaration mining claims may be located by such citizens in the same manner as mining claims are located under the mining laws of the United States...

The Act of May 29, 1924, 43 Stat. 244, codified at 25 U.S.C. §398 (Pet. App. 152), which provides in pertinent part:

> Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so

> assessed against the royalty interests on said lands:
>
> Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The Indian Reorganization Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§461-479 (Pet. App. 154).

The Act of May 11, 1938, 52 Stat. 347, codified as amended at 25 U.S.C. §§396a-396g (Pet. App. 175). Section 7 of that Act provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."

2. State Statutes.

MONTANA CODE ANNOTATED [hereinafter MCA]:

Oil and Gas Net Proceeds Tax, §15-23-601, -603, -605, -607, -608, MCA (Pet. App. 181).

Oil and Gas Severance Tax, §§15-36-101, -103, -105, MCA (Pet. App. 195).

Resource Indemnity Trust Tax §§15-38-103, -104, -105, -106, -108, MCA (Pet. App. 206).

Oil and Gas Conservation Tax, §§82-11-101 (in pertinent part), -131, -132, MCA (Pet. App. 215).

REVISED CODES OF MONTANA, 1947 [hereinafter R.C.M. 1947]:

Oil or Gas Producers Severance Tax, §§ 84-2202, -2204, -2205, and -2209.1, R.C.M. 1947 (the predecessors to §§15-36-101, -103, and -105, MCA) (Pet. App. 222).

STATEMENT OF THE CASE

The Blackfeet Tribe of Indians filed this case in 1978. The first amended complaint (J.A. 9a) challenged taxation

of the Tribe's royalty interests in oil and gas produced on the Blackfeet Indian Reservation, Montana.[2] The Blackfeet Tribe is the lessor of 125 parcels of tribal land for oil and gas mining purposes. All of the challenged taxes

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2 Four taxes are at issue: (1) the Oil and Gas Conservation Tax, §82-11-131, MCA (formerly §60-145, R.C.M. 1947) (Pet. App. 215); (2) the Resource Indemnity Trust Tax, §15-38-104, MCA (formerly §84-7006, R.C.M. 1947) (Pet. App. 206); (3) the Oil and Gas Severance Tax, §15-36-101, MCA (Pet. App. 195); (4) the Oil and Gas Net Proceeds Tax, §§15-23-601, et. seq., MCA (formerly §§84-7201, et. seq., R.C.M. 1947) (Pet. App. 181). The State of Montana through the Montana Department of Revenue collects all taxes except the Oil and Gas Net Proceeds Tax. Although reported to the Department of Revenue, it is collected by the respective county treasurers for the use of the counties. Petitioners Glacier and Pondera Counties have portions of the Blackfeet Reservation within their boundaries.

are paid by non-Indian lessees.[3] The Tribe admits that it has not directly paid any of the taxes, but asserts that the producers have deducted the Tribe's share of taxes from the royalty payments. No producer is a party to this action.

Leasing of the Blackfeet Tribe's oil and gas began in 1932. Until 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases. The taxes were collected pursuant to the specific taxation authority granted to states by the Indian Mineral Leasing Act of 1924, Act of May

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3 The lessee-producers' portion of the taxes is not challenged in this case. After this case was filed, various producers challenged the taxes on the producer's share and the share which might be attributed to the royalty interest in Montana state court proceedings.

29, 1924, 43 Stat. 244, 25 U.S.C. §398 (Pet App. 154) [hereinafter the "1924 Act"], on oil and gas production on "unallotted land" within the Blackfeet Indian Reservation. The question in this case is whether the 1924 Act's taxation authority survived the passage of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g (Pet. App. 175) [hereinafter the "1938 Act"].

The validity of Montana's taxes on oil and gas production of the Blackfeet tribal minerals leased prior to the 1938 Act was upheld by the Montana Supreme Court and this Court in 1936 in _British-American Oil Producing Co. v. Board of Equalization,_ 299 U.S. 159 (1936), _aff'g_ 101 Mont. 293, 54 P.2d 129 (1936). The complaint in _British-American_ was filed by a producer-lessee, and the Blackfeet Tribe filed a complaint

in intervention in the state court proceedings. Montana's gross production and net proceeds taxes at issue in that case were predecessors to the present taxes, and were all assessed against and collected from the producer-lessees, who then could deduct the taxes paid on royalty interests from the royalty payments which were paid to the United States. _See_ _British-American Oil Producing Co._, _supra_, 54 P.2d at 131-32.

Since their unsuccessful complaint in intervention in _British-American,_ the Blackfeet Tribe made no other challenge to these taxes until 1976 when the Tribe filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as the involvement of the Bureau of

Indian Affairs.[4] Similarly, no oil and gas producers challenged the taxes. The United States Department of Interior has never challenged the taxes but has consistently recognized the taxes as legitimate. The Department of Interior and the United States Geological Survey, charged with administration of the Tribe's leases and collection of royalty payments, permitted payment of the challenged taxes from the inception of oil production until 1977 when Leo Krulitz, then Solicitor of the Department of Interior, issued an opinion holding that the 1938 Act "replaced" the 1924

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4 Blackfeet Tribe of the Blackfeet Indian Reservation and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. The Department of Revenue of the State of Montana, et al., No. CV-76-6-GF, U.S. District Court for the District of Montana, Great Falls Division.

Act, and that the State could not levy its taxes on oil and gas production from leases made under the 1938 Act. 84 Interior Dec. 905 (1977), (Pet. App. 267). Shortly thereafter, the Blackfeet Tribe filed the instant action. First Amended Complaint of the Blackfeet Tribe (Pet. App. 131).

In 1938, Congress passed the Indian Mineral Leasing Act of 1938, supra. The 1938 Act changed or did away with various specific provisions of prior Indian mineral leasing acts, and in its last section stated that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Neither the 1938 Act nor any contemporary commentary made any mention of changes or repeals of the tax authorization of the 1924 Act.

In the district court, the Tribe, the State of Montana and the Director of

the Montana Department of Revenue, and Pondera County filed motions for summary judgment. United States District Judge Hatfield granted the State's motion for summary judgment, holding that the 1924 Act expressly authorized state taxation of all oil and gas production on unallotted Indian land, and that this express provision authorizing state taxation was not implicitly repealed by the provisions of the 1938 Act. (Pet. App. 103). Judge Hatfield did not rule on the State's alternate ground for summary judgment, that the incidence of all taxes except the Net Proceeds of Royalty Tax was upon the non-Indian oil producers, who were required by Montana's

statutes to report and pay all taxes.[5]

The Blackfeet Tribe appealed Judge Hatfield's decision to the Ninth Circuit

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5 The State has never conceded that the tribal royalty was in fact taxed. The Net Proceeds Tax is the only challenged tax in which the producer's interest is mathematically segregated from the royalty owner's interest. The remaining taxes are reported and paid by the producers, and it is not possible for the Montana Department of Revenue to tell from its records what is the arrangement between the producers and the Tribe with respect to proration of the taxes. Montana law permits the producer to pass on a pro rata share of the taxes unless the lease provides otherwise. See, e.g., §§15-36-101(3) (Pet. App. 199) and 15-38-104 (Pet. App. 207) MCA.

The collection mechanism between the producers and the Tribe has been varied. See, e.g., 58 Interior Dec. 535 (1943) (Pet. App. 232); Memorandum M-36246, October 29, 1954 (Pet. App. 248, 251, 257). It is assumed for purposes of this brief that the producer pays the taxes, and either deducts them from the royalty payments or receives a refund from the Department of Interior for the pro rata portion of the tax attributed to the Tribe's royalty. If the State prevails in its argument that the 1924 Act's tax authorization applies to leases made after 1938, all taxes on production will be permissible, including taxes on the Tribe's royalty.

Court of Appeals, and on December 14, 1982, a three-judge panel affirmed the district court's ruling. (Pet. App. 70). The Tribe petitioned for rehearing en banc, which was granted on June 22, 1983, 709 F.2d 521. On rehearing en banc, the Ninth Circuit Court of Appeals held that there had been no repeal of the tax authority in the 1924 Act and that the State continued to have authority to tax oil and gas production for 1924 Act leases.[6] The en banc panel, however, adopted the reasoning of the 1977 Krulitz

6 The 1924 Act amended the Act of Feb. 28, 1891, 26 Stat. 795, codified at 25 U.S.C. §397 (Pet. App. 150), by extending the term of the leases from ten years to as long as there was production of oil and gas. British-American, supra, held that these Acts should be read together as a whole and that, therefore, the 1924 Act's tax authorization applied to 1891 Act leases. The Ninth Circuit found this "problematic." 729 F.2d at 1195 n. 9. (Pet. App. 13, n. 9.)

opinion and held that the 1938 Act completely replaced all prior leasing acts, including the 1924 Act, so that royalties from production under all leases made after May 11, 1938, are not subject to Montana's taxes. The court held that the 1938 Act had to be read together with the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-79 (Pet. App. 154) [hereinafter "I.R.A."], and that the Act's policy and purposes would not permit state taxation of Indian royalties from oil and gas produced on unallotted Indian lands.

After holding that the state taxes at issue here were not authorized by the 1938 Act for leases entered into pursuant to that Act (and were, therefore, not authorized at all), the court nonetheless remanded the case to the district court

for a determination of the legal incidence of the State's taxes, and a determination of whether the taxes were preempted, using the analysis required in Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982). 729 F.2d at 1203 (Pet. App. 51). Three judges dissented from the holding that the 1938 Act "replaced" the 1924 Act.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion demonstrates a masterful, but erroneous, effort to accomplish judicially what Congress did not do--repeal or replace the 1924 Act's express authorization of the State's taxes on production of oil, gas, and other minerals. The 1938 Act was silent

on the issue of taxation and contained a general repealer, repealing only "all Act or parts of Acts inconsistent" with the 1938 Act. The legislative history of the 1938 Act made no mention of changing the provision allowing state taxation of production of oil and gas. The Department of Interior, which had supported adoption of both the 1924 and the 1938 Acts, assisted the State in collecting its taxes on all leases for a period of more than 40 years. The court ignored the plain language of the 1924 Act and discredited the administrative history which is compelling evidence of the continued vitality of the 1924 Act's tax authorization, including for leases made pursuant to the 1938 Act.

In holding that the 1938 Act "replaced" but did not repeal the 1924 Act, the court found that the 1924 tax

authorization was in force for leases made between 1891 and 1938, but by judicial fiat determined that the otherwise operative tax authority did not affect leases made after May 11, 1938.

Rather than use any applicable canons of construction in its analysis of the 1924 and the 1938 Acts, the court attempted to perform the legislative function of interpreting trends, concerns, goals, and policies of Congress. The cornerstone of the court's opinion was its conclusion that the 1938 Act must be viewed in light of the policies of the I.R.A. which also was silent on the topic of state taxation of the production of Indian oil and gas. An application of judicial canons of statutory construction to the two statutes on Indian mineral leasing compels the conclusion that the 1924

Act's tax authorization was not inconsistent in any way with the 1938 Act, and that the 1924 Act's tax authorization was not repealed or otherwise eliminated by the 1938 Act.

Furthermore, if the Court had limited its analysis of Congress' goals and policies in adopting the I.R.A. and the 1924 and the 1938 Acts to what Congress actually said, the court would have had to conclude that Congress expressed no intention whatsoever to eliminate its authorization to states to tax Indians' royalty interest in oil and gas production on their unallotted lands. Both the I.R.A. and the 1938 Act were silent on the matter of the 1924 tax authorization. Despite what appears to have been a scholarly examination of the legislative history of the I.R.A., the court was not able to find any evidence

in the legislative history directly on the topic of state taxation of production of oil and gas owned by Indians, or on Congress' authorization to tax tribal royalties. Nonc exists. Nonetheless, the court held that one of the policies of the I.R.A. was that Indians' oil and gas production should be exempt from state taxation, and that therefore the later 1938 Act "replaced" the 1924 Act's taxation authority. The court thus embarked on the erroneous course of using its perception of general policies pertaining to different acts of Congress in order to rewrite the plain language of statutes and the contemporaneous legislative history of the act in question.

An examination of the I.R.A. and its legislative history and commentary reveals no intent of Congress to reverse

the tax authorization in the 1924 Act or in other Indian mineral statutes. The 1938 Act and its legislative history and commentary show that Congress sought to enact a general Indian mineral leasing act applicable to all minerals. Congress plainly expressed its own intentions in enacting the 1938 Act: to provide that Indian minerals would not be leased without the consent of the affected tribe; to provide for some discretion in the Secretary of the Interior to approve or disapprove of the leases; and to remove the mining of metalliferous minerals on unallotted Indian lands from the provisions of the mining laws of the United States as was provided for in Section 26 of the Act of June 30, 1919, 41 Stat. 31.

The authorization to tax Indian mineral royalties was not inconsistent

with any expressed intent of Congress in passing the I.R.A. or the 1938 Act. The Ninth Circuit theorized that Congress' intent in the I.R.A. to reverse the land allotment policy of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§331-334, resulted in a reversal of the tax authority in the 1924 Act. 729 F.2d 1196-1197 (Pet. App. 17-20). This theory is incorrect. There is nothing in the relevant legislation or legislative histories showing that Congress intended to eliminate the previously granted tax authorization. The tax authorization therefore remains in effect.

ARGUMENT

I. IN THE 1924 ACT CONGRESS AUTHORIZED STATES TO TAX TRIBAL ROYALTIES FROM OIL AND GAS PRODUCTION AND THAT AUTHORIZATION REMAINS IN EFFECT.

A. Congress has not Repealed the 1924 Act's Tax Authorization.

In the 1924 Indian Mineral Leasing Act, supra, Congress expressly authorized states to tax tribal royalties from production of oil and gas and other minerals from unallotted tribal lands. That tax authorization has never been repealed. It therefore remains operative notwithstanding the passage of the 1938 Indian Mineral Leasing Act, supra.

The 1924 Act applied to lands subject to lease for mining purposes under the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. §397 (Pet. App.

152).[7] In British-American Oil Producing Co. v. Board of Equalization of Montana, supra, this Court held that the Blackfeet Tribe's mineral reserves were unallotted lands that were "bought and paid for" by the Tribe and subject to lease under the 1891 and 1924 Acts, and that they were therefore subject to Montana's mineral taxes under the 1924 Act even though the surface estate may have been allotted.

The State of Montana and the petitioner counties have collected all applicable local and state taxes on oil and gas production on the Blackfeet Reservation from the inception of

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7 Lands subject to lease under this Act were lands occupied by Indians who had "bought and paid for" them, which "are not needed for farming or agricultural purposes, and 'are not desired for individual allotments." (Pet. App. 151).

production until 1977. After this Court in British-American, supra, upheld the collection of taxes which were the predecessors of the taxes at issue here, there was no serious challenge to the continued viability of the 1924 Act's tax authorization, despite the passage of the 1938 Act. The Blackfeet Tribe, which had intervened in British-American in the state court proceedings, did not make any further challenge to these taxes until 1976 when the Tribe filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as challenging the involvement of the Bureau of Indian Affairs in the tax collection. See n. 4, supra. Similarly, no oil and gas producers challenged the taxes.

Not only were there no challenges to the taxes by the affected tribes and

producers, but the United States recognized the continued validity of the taxes until 1977. The United States Department of Interior, charged with administration of the Tribe's leases and collection of royalty payments, has consistently recognized the taxes as legitimate, and, with the United States Geological Survey, has facilitated payment of the challenged taxes from the inception of oil production until 1977, notwithstanding passage of the 1938 Act. Virtually no one in the United States government publicly questioned the validity of petitioners' taxes. In fact, in 1972, the Solicitor General of the United States filed an amicus brief in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), stating at page 7 that the state tax authorization in the 1924 Act remained in effect.

The Department of Interior's constant position on the applicability of the challenged taxes to production of oil and gas from tribal lands is documented in a series of memoranda and opinions from the office of the Solicitor of the Department of Interior: 58 Interior Dec. 535 (1943) (Pet. App. 232); Memorandum M-36246 (October 29, 1954) (Pet. App. 248); Memorandum M-36310 (October 13, 1955) (Pet. App. 258); Memorandum M-36345 (May 4, 1956) (Pet. App. 262). The Department's position was questioned by Marvin Sonosky, long-time advocate for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, but the opinions issued rejected his position that the taxes were not valid. Memorandum M-36310, supra (Pet. App. 258); Memorandum M-36345, supra (Pet. App. 262). In 1977, however, the United

States Department of Interior officially changed its position. The change was accomplished through the opinion of then Solicitor Leo Krulitz who held that the 1938 Act "replaced" the 1924 Act, and that the State therefore could not levy its taxes on oil and gas production from leases made after passage of the 1938 Act. 84 Interior Dec. 905 (1977) (Pet. App. 267). Bolstered by the opinion, the Blackfeet Tribe filed the instant action.

The 1977 opinion reversing the 1955 and 1956 opinions was a bolt out of the blue, not only because it summarily reversed a position endorsed by the Department for more than forty years, but also because there had been absolutely no change in the controlling legislation which could provide an impetus to the Department to change its long-time administrative practices.

The Ninth Circuit erroneously adopted the conclusions of the 1977 opinion. In support of its own opinion, the Ninth Circuit relied on the recent edition of F. Cohen, Handbook of Federal Indian Law 409 (1982), which opined that the 1938 Act which repealed "all Act [sic] or parts of Acts inconsistent" with the 1938 Act "likely repealed the prior leasing Acts to which the tax consents had related (as to new leases)." 729 F.2d at 1195 n. 9. (Pet. App. 13 n. 9); 729 F.2d at 1200 n. 20 (Pet. App. 36 n. 20). The authority relied on by the Handbook for this proposition was the 1977 Solicitor's opinion. F. Cohen, Handbook at 409 n. 43. The 1977 Solicitor's opinion was given far greater credence than it deserved. The Ninth Circuit should have considered the fact that the 1942 edition of the Handbook of Federal

Indian Law, written by Felix Cohen almost contemporaneously with the passage of the 1938 Act, contained no support for the court's conclusion that the prior tax authorizations were affected by the 1938 Act.

B. Standard Statutory Analysis Compels the Conclusion that the 1924 Act's Taxation Authority Survived the Passage of the 1938 Act.

The Ninth Circuit erroneously held that the 1924 Act's taxation authority disappeared for leases made after passage of the 1938 Act. In evaluating whether the clear authority in the 1924 Act for the State to tax tribal royalties vanished with passage of the 1938 Act, the Ninth Circuit should have used standard canons of construction. The court should have examined Section 7 of the 1938 Act which repealed only those

parts of previous acts inconsistent with the 1938 Act; should have applied accepted canons of construction for looking at general legislation on the same subject for which specific legislation exists; and should have reviewed the two statutes together in order to determine whether one statute or a part of it was repealed. The analysis also should have included a review of the administrative practice relating to the legislation.

If done, such an analysis compels the conclusion that Congress' grant of authority to states to tax tribal royalties remains intact. First, an analysis of Section 7 of the 1938 Act compels the conclusion that provisions of previous acts not inconsistent with the 1938 Act remained intact. The tax authorization in the 1924 Act is such a

provision. When Congress included Section 7 in the 1938 Act, the standard construction given such a clause repealing inconsistent acts or parts of acts was that it was in "legal contemplation a nullity," expressly limiting the repeal to acts that <u>are</u> inconsistent. 1A C. Sands, <u>Sutherland Statutory Construction</u> §23.08 at 221 (4th ed. 1972). That standard construction, still used today, had long been in effect in 1938. This Court stated in 1885 that a clause repealing only "inconsistent acts" "implies very strongly that there may be acts on the same subject which are not thereby repealed." <u>Hess v. Reynolds</u>, 113 U.S. 73, 79 (1885). Even earlier, this Court said that a repealer of inconsistent provisions is a plain indication of Congress' intention "to leave in force some portions of former

acts relative to the same subject matter." <u>United States v. Henderson,</u> 78 U.S. (11 Wall.) 652, 656 (1870).

The significance of Section 7 of the 1938 Act is that the 1938 Act was not intended to be comprehensive to the exclusion of all provisions of then-existing statutes[8] relating to mineral leasing of unallotted Indian lands. There is nothing in the 1938 Act inconsistent with the 1924 Act's authority for state taxation of tribal royalties. As a matter of fact, less

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8 In addition to the tax authorization in the 1924 Act for treaty reservations, there had been other authorizations to tax Indian royalties passed by Congress in various Indian mineral leasing acts. <u>See, e.g.,</u> Act of March 3, 1921, 41 Stat. 1249-1250; Act of April 28, 1924, 43 Stat. 176, 25 U.S.C. §401; Act of March 3, 1927, 44 Stat. 1347; Act of May 10, 1928, 45 Stat. 496. As with the tax provision in the 1924 Act, the taxation authority in these statutes is clear and unambiguous.

than a week before the 1938 Act was passed there were hearings before the Senate Committee on Indian Affairs relating to a resolution which, _inter alia_, would have permitted an accounting of mineral production taxes which states had not been able to collect on production of Indian minerals prior to the enactment of the various tax consent statutes. That hearing demonstrated that at the time Congress was about to pass the 1938 Act, no one was questioning or trying to eliminate the authorization of state taxation of Indian mineral production. _Loss of Revenue-Tax Exempt Indian Lands_, Hearing on S. Res. 168 Before the Senate Committee on Indian Affairs 5, 10, 75th Cong., 3d Sess. (May

6, 1938).[9] It is absurd to conclude that this congressional authorization to tax, unquestioned on May 6, 1938, is inconsistent with the 1938 Act, passed five days later on May 11, 1938. Congress knew how to repeal the taxing provisions contained in the 1924 Act, and knew how to repeal all provisions of all previous mineral leasing acts. It did

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9 The Ninth Circuit cited this hearing as an indication that desire to authorize taxation was an out-moded response to states' concerns with the tax exempt status of Indian lands and property where the states were funding services to Indians. 729 F.2d at 1196 n. 13 (Pet App. 18 n. 13). The Ninth Circuit ignored the fact that at the hearing the witnesses recited the questions and problems related to taxation of Indian property and income which existed prior to the congressional authorizations for states to tax mineral production on Indian lands. At the hearing, no one questioned that those taxation provisions contained in various mineral leasing acts were in effect.

not do so, however, and the Ninth Circuit was wrong in concluding that all acts prior to the 1938 Act were "replaced."

The 1924 and 1938 Acts are on the same subject--Indian mineral leasing--and should therefore have been analyzed using certain rules of statutory construction. Since there is no explicit repeal, the court should have analyzed whether one statute repealed the other by implication. There is a strong presumption against repeals by implication. United States v. Borden Co., 308 U.S. 188, 198 (1939); Frost v. Wenie, 157 U.S. 46, 58 (1895). As explained by this Court:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest....

Posadas v. National City Bank, 296 U.S. 497, 503 (1936) (Emphasis added).

It is well settled that the courts must not use a strained construction of a statute in order to find an inconsistency. United States v. Noce, 268 U.S. 613, 619 (1925). Inconsistency is never presumed, and will not be found if any other reasonable construction exists. Frost v. Wenie, supra, 157 U.S. at 58.

There is no inconsistency between the 1924 Act's express authorization to tax and the 1938 Act's silence on taxation. The taxation authority in the earlier act continues in force, including for leases entered into after passage of

the 1938 Act. Under applicable rules of statutory construction, there is no need to examine the underlying unexpressed intent of Congress in passing the 1938 Act, as the Ninth Circuit Court did. An intent to repeal must be "clear and manifest." Posadas v. National City Bank, supra, 296 U.S. at 503. However, as discussed infra, Section IV, such an analysis, if applied, reveals only that Congress expressed no suggestion or intent to repeal, reverse, or replace the 1924 Act's authorization to tax tribal royalties, even though Congress itemized in detail the specific provisions of previous mineral leasing acts which were to be corrected or changed in what was to become the 1938 Act.

This canon of construction relating to two statutes on the same subject applies when there is a later general

statute and an earlier specific statutory provision. Then the principle against repeals by implication is especially strong. In British-American Oil Producing Co. v. Board of Equalization, supra, 299 U.S. at 166, this Court stated that:

> [t]he special provisions related to the same subject that is dealt with in the general provisions and are to be read in the light of the latter. All were in force when the lease was given and all should be treated as one law so far as this reasonably could be done.... [T]here is no conflict, nor anything to prevent all from being carried into effect as if there were one law.

See also MacEvoy Co. v. United States, 322 U.S. 102 (1944); Morton v. Mancari, 417 U.S. 535 (1974). In Morton v. Mancari, this Court stated that: "[w]here there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general

one...." 417 U.S. at 550-551.

Finally, when looking at whether an earlier statutory provision continues to exist when there is a later statute on the same subject, a court cannot overlook or ignore the history of administrative practice related to a statutory provision. In the instant case, the Ninth Circuit did overlook the United States' consistent practice of over forty years of authorizing and recognizing the power of the State to collect the taxes in question. The enactment of the 1938 Act had no effect upon the Department of Interior's interpretation that the 1924 Act's tax authorization continued in effect for post-1938 leases. <u>See</u> discussion <u>supra</u> at 28-30.

This sort of interpretation by the department charged with administration of the 1938 Act must be given consideration

and deference by courts. <u>Rice v. Rehner</u>, 103 S. Ct. 3291, 3301 n. 13, ___ U.S. ___, (1983). This deference should be accorded to the interpretation of the Department of Interior immediately following enactment of the 1938 Act, not the unfounded interpretation of 40 years later. That earlier interpretation, especially when coupled with the constant collection of the taxes, represents a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." <u>Aluminum Company of America v. Central Lincoln Peoples' Utility District</u>, 104 S. Ct. 2472, 2480, ___ U.S. ___, (1984) (Citations omitted).

The Ninth Circuit erred in overlooking the long-time administrative

practice of allowing the taxes to be collected. It likewise erred in refusing to consider or apply standard canons of statutory construction either to Section 7 of the 1938 Act, or to the court's analysis of the 1924 and 1938 Acts together. The court strained to defeat the 1924 tax authorization, and should be reversed.

II. THE NINTH CIRCUIT ACTED ERRONEOUSLY TO EXCISE JUDICIALLY THE 1924 ACT'S TAXATION AUTHORITY.

Rather than use the standard statutory constructions applicable when there are two statutes on the same subject, the Ninth Circuit considered trends, goals, and policies. The court made determinations of a sort reserved for legislators rather than judges. The court did not confine itself to looking at the policies and goals of the 1938 Act

in order to interpret that Act and the 1924 Act. Instead, it looked to a variety of legislative comments and used what it perceived to be the purpose of the I.R.A. as a back-drop for interpreting the 1938 Act. The court concluded that by 1938 the tax authorizations contained in various mineral leasing acts were defunct.

The court was wrong. The I.R.A. did not deal with the taxation of minerals or royalty income at all. As discussed _infra_, Section III, the Ninth Circuit attributed to Congress the wrong trends, intents, and policies in relation to tax authorizations in mineral leasing acts. Even if the court had been more accurate in its perceptions of Congress' intents and policies, the court's use of these in order to eliminate Congress' clear authorization to states to tax royalty

income was an improper use of judicial power which must be overruled.

Questions of tax immunities and authorizations are peculiarly legislative in nature and are not to be eliminated by implication. E.g., First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968). In relation to tax authorizations and immunities for Indians, this Court has stated that the question of whether an immunity from taxation exists is "essentially legislative in character." Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 150. In that case, it was argued that Section 5[10] of the I.R.A. exempted revenues from tax-exempt lands from state

10 Section 5 of the I.R.A. provides in relevant part that lands or rights acquired pursuant to the I.R.A. "shall be exempt from State and local taxation." See discussion, Part III, infra.

and local taxation. See, e.g., Amicus Brief of United States 7, Mescalero. This Court rejected that argument. This Court recognized that courts ordinarily will not imply tax exemptions, and held that the I.R.A. did not create tax immunities not explicitly set forth in the I.R.A., including for income gained from tax-exempt land. Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 157-158.

In areas other than taxation, this Court has rejected arguments that the policy and intent of the I.R.A. should be used in order to interpret separate statutes. Reversing a decision by the Ninth Circuit last year, this Court declined to apply policies of the I.R.A. to override specific statutory provisions relating to liquor sales in "Indian Country." Rice v. Rehner, supra, 103 S.

Ct. 3291, ___ U.S. ___, (1983), rev'g 678 F.2d 1340 (9th Cir. 1982). One of the arguments made by Eva Rehner was that the I.R.A. policy should be applied in order to find that Congress intended that states lack jurisdiction over Indian country liquor licensing and distribution. Respondent's Brief on the Merits 11, Rice v. Rehner. This Court did not adopt that analysis.[11]

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11 In 1982, the Ninth Circuit itself declined to apply congressional policies toward Indians to an analysis of whether a later statute impliedly repealed an earlier statute, even though the court acknowledged that the United States' policy toward Indians had likely changed, "shifting away from an assimilationist approach in the years since the allotments were made." Southern California Edison Co. v. Rice, 685 F.2d 354, 356 (9th Cir. 1982), cert. denied, 103 S. Ct. 1497, ___ U.S. ___ (1983). In Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977), the Ninth Circuit held that Section 16 of the I.R.A. did not preclude state taxation of leaseholds of tribal land.

The Ninth Circuit's opinion, misapplying congressional trends and I.R.A. policies in order to eliminate Congress' clear authorization to tax tribal royalties, represents a misuse of judicial power. This approach must be reversed.

III. THE INDIAN REORGANIZATION ACT DID NOT CANCEL CONGRESS' AUTHORIZATION OF TAXATION OF TRIBAL ROYALTIES.

The Ninth Circuit's rationale for applying its perception of the congressional policy behind the I.R.A. to its interpretation of the 1938 Act was that one stated purpose of Congress in passing the 1938 Act was to "bring all mineral leasing matters in harmony with the [I.R.A.]." 729 F.2d at 1198 (Pet. App. 27). In fact, that was a purpose of the 1938 Act. S. Rep. No. 985, 75th Cong., 1st Sess. (1937) (Pet. App. 343,

346-353) [hereinafter "S. Rep. No. 985"]; H. Rep. No. 1872, 75th Cong., 3d Sess. (1938) (Pet. App. 355) [hereinafter "H. Rep. No. 1872"]. However, Congress specified the very provisions of the I.R.A. with which the 1938 Act was to harmonize. E.g., S. Rep. No. 985 (Pet. App. 345-346). Those provisions, in Sections 16 and 17 of the I.R.A., gave tribes which were organized under the I.R.A. the authority to lease their lands (albeit for no more than ten years), and to prevent the leasing of tribal lands without tribal consent. At times in its opinion, the Ninth Circuit appeared to recognize that these were the I.R.A. provisions with which Congress sought to harmonize the previous Indian mineral leasing acts. 729 F.2d at 1198 (Pet. App. 25-26), 729 F. 2d 1199 (Pet. App. 31-32). Despite this apparent recognition by the

court, the court's prevailing rationale for its opinion seemed to be that the 1924 Act's tax authorization was a part of Congress' earlier policy embodied in the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§331-334, and that in 1934 Congress saw that policy as evil. The Ninth Circuit seemed to conclude that in passing the I.R.A. Congress reversed the allotment policy, and must also have intended to do away with the 1924 Act's authorization to tax mineral production, even though Congress did not say so, and even though the 1924 Act applied to minerals which had not been allotted. Although the court did not go so far as to hold that the I.R.A. itself repealed all acts which the Ninth Circuit viewed as being inconsistent with the I.R.A. policies, it did conclude that the 1924 Act's tax authorization was

limited to leases entered into prior to passage of the 1938 Act. For those leases, the taxes may be collected, although the taxes are contrary to the Ninth Circuit's view of the policies of the I.R.A.

The 1924 Act, of course, already had a provision which would allow tribes to prevent unwanted leasing by withholding their consent to a lease, although under this Act leasing was to be done by the Secretary of the Interior.

In addition to eliminating conflicts between Sections 16 and 17 of the I.R.A. and earlier mineral leasing statutes, Congress sought to cure specific defects which it saw in existing mineral leasing statutes, specifically in Section 26 of the Act of 1919, supra. None of these specific problems was related in any way to the previously granted authority to

tax tribal royalties. See Section IV, infra.

In support of its thesis that the I.R.A. policies prohibited taxation of Indian royalties, the Ninth Circuit opinion made numerous references to legislative hearings and commentary about the I.R.A., but cited nothing that directly dealt with taxation. The obvious reason for the lack of references to comments on taxation in the opinion is that no such material exists in the I.R.A. legislative history. Instead, the opinion focused upon the fact that the I.R.A.'s primary purpose and objective was to reverse and repudiate the previous program of allotting parcels of land to Indians under the allotment program, which had become a "scandal and a blot." 729 F.2d at 1197 (Pet. App. 18-20), citing 78 Cong. Rec. 11727, 11126, and

11743 (1934). Review of the referenced pages of the Congressional Record reveals that the "blot," the "tragedy," the "evil," and the "scandal" of the allotment policy which Congress wanted to reverse and cure was the loss of huge amounts of Indian lands. This was the primary purpose of the I.R.A. and the subject of lengthy committee hearings. E.g., Hearings on S. 2755 and S. 3645. Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) [hereinafter "I.R.A. Hearings"] at 57, 61, 117, 133-34, 143, 147, 148, 153, 173, 183, 190. The I.R.A. stopped further allotments and provided for reacquisition of lands by tribes. None of the discussion about the lands lost through the allotment system or the lands to be revested in tribes pursuant to the I.R.A. included discussions of mineral estates.

The probable reason for this was that mineral deposits were not generally desired for individual allotments and were not, therefore, likely to be allotted or lost to the tribes through the allotment program. See, British-American, supra, 299 U.S. at 164.

The Ninth Circuit's review of the I.R.A. and its legislative history was correct only insofar as it addressed the primary purpose of the I.R.A. which was to stop land losses. The court's remaining inferences and conclusions that the 1924 Act's tax authorization was inconsistent with the I.R.A.'s policies are without any support in the statute or its legislative history. The court's numerous references to the legislative history simply do not support its conclusions.

During the I.R.A. Hearings, Congress

repeatedly set forth a list of the goals and purposes of the I.R.A. and the problems which Congress sought to cure. E.g., 78 Cong. Rec. 11727. Not one of those listed purposes or problems concerned state taxation of any sort. It is significant that the only subject mentioned without criticism by Congress in its litany of the plight of the Indians and the causes of Indian problems was oil and mineral royalty payments made to the Indians, including in Montana. 78 Cong. Rec. 11728 (remarks of Mr. Howard).

The only other noteworthy mention of Indian mining and mineral leasing in the legislative history to the I.R.A. involved the Papago Reservation. A 1932 Interior Department decision had erroneously ruled that the Papagos' mineral estate was to be withdrawn from mineral entry under the public land

mining laws, even though the agreement and the executive order creating the Papago Reservation had specifically reserved the mineral estate to the United States, and had kept the minerals open to exploration and location under public mining laws. E.g., 78 Cong. Rec. 11127-11134, 11137. In order to repudiate that erroneous decision, Congress included specific language reversing the Interior Department opinion in what became Section 3 of the I.R.A. (Pet. App. 155-156).[12]

Aside from the lengthy discussions on the Papago minerals and the favorable reference to royalty payments for tribal

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12 In the Appendix to the Petition for Certiorari, the I.R.A. is reproduced as it existed prior to various later amendments which do not affect this case, including a repeal in 1955 of the Papago mineral provision.

minerals, the I.R.A. legislative history does not contain any discussion of taxation of royalties or of the then well-established tax consent provisions of Indian mineral leasing acts. The Ninth Circuit thus was wrong in implying in its opinion that the I.R.A.'s legislative history supported its opinion.

Even when Section 5 of the I.R.A., the only section of the Act dealing directly with tax exemptions, was being discussed in Congress, e.g., 78 Cong. Rec. 11126, there was no suggestion of eliminating the authorized taxes on tribal royalties. In addition, it is significant that Congress rejected provisions of predecessor bills to the I.R.A. which provided for broad immunities from state and local taxes. The earlier provisions stated that "nothing in this Act shall be construed

as rendering the property of any Indian Community...subject to taxation, by any State or subdivision thereof...." H.R. 7902, 73d Cong., 2d Sess., 78 Cong. Rec. 2437 (1934); S. 2755, 73d Cong., 2d Sess., 78 Cong. Rec. 2440 (1934).

In the I.R.A. Hearings, there was mention of the states' losing taxes because of the implementation of the I.R.A. I.R.A. Hearings at 160. Apparently, Congress was sensitive to this problem, because the I.R.A. did not include the broad tax immunities included in the predecessor bills.[13] The Ninth

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13 At the same time that these broad tax-immunity provisions were eliminated, accompanying provisions for more extensive powers on the part of Indian communities chartered under the proposed I.R.A. were also discarded. One of the specified powers included but later eliminated was the power of an incorporated Indian Community to conduct mining activities. H.R. Rep. No. 1804, 73d Cong., 2d. Sess. 6 (1934).

Circuit, however, ignored the elimination of the broad tax immunities. Moreover, the Ninth Circuit concluded that in 1934 and 1938 Congress was no longer concerned about states' losing revenues because of tax exemptions for Indian lands. The court stated that the tax authorizations in the 1924 Act and in the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§398a-398e,[14] were adopted in response to these concerns, but erroneously concluded that by 1934 and 1938 those concerns had disappeared. 729 F.2d 1192 (Pet. App. 17-18). The legislative history does not support the Ninth Circuit's conclusion.

This Court has viewed elimination of

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14 The 1927 Act authorized state and local taxation on oil and gas production on executive order reservation lands. See Amici Curiae Brief submitted in support of the Petitioners.

the broad tax immunities in the predecessor bills as one indication that the I.R.A. was not intended to create tax immunities not specifically set forth in the I.R.A. Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 157. In Mescalero, various entities, including the United States, argued that state taxation of tribal income from tax exempt land frustrated and destroyed the policy of Congress expressed in the I.R.A. to encourage tribal development, economic independence and self-government. E.g., Amicus Brief for Agua Caliente Band of Mission Indians 3, 6-7, 12; Amicus Brief for the United States 7; Amicus Brief for the Association of American Indian Affairs 12, 15, Mescalero. This Court rejected those arguments and held that Sections 5, 16, and 17 of the I.R.A. did not imply an expansive tax immunity.

The Ninth Circuit, however, essentially concluded that in passage of the I.R.A. Congress did imply an expansive immunity from taxation which had been specifically authorized in the 1924 Act. The court held that because the I.R.A. was designed to help Indians become economically independent and self-sufficient and take control of their own resources, the I.R.A.'s goals showed that Congress intended to end state taxes authorized by the 1924 Act. 729 F.2d at 1197 (Pet. App. 22-23).[15] In addition to

15 The Tribe's complaint only alleges that the 1924 authority to tax was limited to 1924 Act leases, as the 1938 Act "replaced and supplanted" the earlier mineral leasing act. Neither the complaint nor the record in this case alleges or suggests that the tax authority should disappear because it interferes with tribal self-sufficiency or independence. The only thing mentioned as a boon to Indian economy in discussions of the Indian plight in 1934 was royalty payments, which were then subject to taxation. 78 Cong. Rec. 11728.

references to the Congressional Record where these goals were discussed, the Ninth Circuit cited Morton v. Mancari, supra, 417 U.S. at 542, as support for its ruling. Id. Morton v. Mancari did hold that Congress enacted the I.R.A.'s employment preference provision in order to help Indians take control of their own resources and become self-sufficient. The Ninth Circuit, however, overlooked the fact that Morton v. Mancari dealt with a very specific provision for Indian preference in employment which was included in the I.R.A in order to implement the goals of Congress. One of the ways by which Congress envisioned achieving the goal of tribal autonomy was to ensure that Indians could and would become employed by the Bureau of Indian Affairs which was staffed almost entirely by non-Indians in 1934. In addition to

enacting Section 12 of the I.R.A. providing for Indian employment preference in the B.I.A. in order to effectuate this goal, Congress explicitly referred to the effect this statute would have on the existing civil service laws. At the request of Commissioner Collier, the language "without regard to civil service laws" was added to the provision directing the Secretary of the Interior to establish various standards for Indians who might be appointed to positions in the B.I.A. See I.R.A. Hearings at 256-259.

All indications are that Congress did not intend or imagine that the goals of the I.R.A would change existing law without any specific action by Congress. In addition to the specific provision on Indian preference in employment, Congress included other specific provisions in the

I.R.A. to implement the goal of increased tribal control over tribal economies and resources. Congress established an Indian credit system and fund (see, e.g., I.R.A. Hearings at 154, 168) and gave tribes the ability to prevent land losses and leasing. Moreover, there were references in the I.R.A. to statutes which were outdated in light of new policies. For example, during the Senate committee hearings on the I.R.A., it was acknowledged that the then existing federal Indian liquor laws, 18 U.S.C. §§1154 and 1156, prohibiting liquor transactions in "Indian Country" or with Indians, had outlived their purpose and were contrary to common sense and national policy. I.R.A. Hearings at 200. Nonetheless, an explicit repeal by Congress in 1953 was required to nullify the absolute prohibition. 18 U.S.C.

§1161. If statements of congressional policy made during the I.R.A. hearings were sufficient to override existing statutory provisions which were arguably inconsistent with the policy of the I.R.A., Congress' enactment of 18 U.S.C. §1161 would have been unnecessary and inexplicable.

Even after the I.R.A. was passed, Congress specifically consented to state taxation of all mineral production, including against the royalty interests from unrestricted lands in Oklahoma in the Act of June 26, 1936, 49 Stat. 967, 25 U.S.C. §501. Also, as discussed above at p. 36, the May 6, 1938 Hearing on S. Res. 168 indicated that congressionally authorized taxation was not, at that date, perceived as being harmful, diminished by the I.R.A., or about to be eliminated by the 1938 Act.

One post-1938 Act indication that neither Congress nor the Commissioner of Indian Affairs was concerned with eliminating the states' power to tax mineral production under the I.R.A. is a remark of Commissioner Collier on the I.R.A. In an annual report, 1941 Secr. Inter. Annual Report 451, Mr. Collier noted the lack of tribal economic improvement and independence despite the passage of the I.R.A. seven years before. Commissioner Collier concluded that the slow economic improvement of the Indians was caused by Congress' refusal to appropriate the funds authorized in the I.R.A. for tribal economic development. This report was made in 1941, when Montana's taxes in question here were being collected, and after the Montana Board of Equalization had been successful

in its defense of the taxes in British-American, supra. Mr. Collier did not blame state taxation of tribal royalties as a cause of the failure of tribes to develop as planned by the I.R.A.

Even if it were acceptable for the Ninth Circuit to try to divine Congress' policies and goals in passing the I.R.A. in relation to state taxation of Indian minerals, the court's conclusion that the I.R.A. eliminated the congressionally authorized taxes in issue is not supportable. Congress' authorization of states' taxation of tribal royalties is not adverse to any policy or intention stated by Congress in adopting the I.R.A. or the 1938 Act, and the specific provisions of the I.R.A. with which Congress sought to harmonize the 1938 Act have nothing to do with state taxation.

Contrary to the Ninth Circuit's conclusion, the legislative history of the I.R.A. itself reveals no intention by Congress to end previously authorized state and local taxation of mineral production on the Blackfeet or any other Indian reservation in order to encourage tribal autonomy. The "about-turn" that Congress attempted in the I.R.A. was to stop the allotment program and the resulting loss of Indian lands. The Ninth Circuit's broad and incorrect construction of the I.R.A. as applied to the court's interpretation of the 1924 and the 1938 Acts should be reversed. If any part of the I.R.A. is to be read together with the 1938 Act it should be the provisions of Section 16 and 17 dealing with leasing. Those provisions have no effect at all on the tax authorization in the 1924 Act. The 1924

Act's tax authorization was not, as the Ninth Circuit concluded, a thing of a by-gone day when the Allotment Act and its policy were in effect.

IV. THE 1924 ACT'S AUTHORIZATION TO TAX IS NOT CONTRARY TO THE PURPOSE OF THE 1938 ACT, AND WAS LEFT INTACT BY THAT ACT.

The Ninth Circuit bolstered its conclusion that the 1938 Act dispensed with the 1924 Act and its authorization to tax by misreading the legislative history of the 1924 and 1938 Acts. The Ninth Circuit concluded that the purposes of the 1938 Act were contrary to the purposes and language of previous Indian mineral leasing acts, including, especially, the 1924 Act. 729 F.2d at 1198 (Pet. App. 24-27). That is not true.

The court stated that the purpose and incentive behind the 1924 Act,

gleaned from "common themes" of various pieces of congressional legislation over a span of seventeen years (729 F.2d 1196, Pet. App. 15-18),[16] was to encourage non-Indian development and settlement on tribal lands. The Ninth Circuit concluded that this purpose differed substantially from the purpose of the 1938 Act which was to foster tribal autonomy.

Yet, a review of the legislative history of the 1924 Act itself shows that its over-all purposes were not different from the pruposes of the 1938 Act. Both acts were passed in order to have oil and gas on tribal lands developed and yield returns for the benefit of Indians. The

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16 Curiously, none of the court's references for this proposition is to the 1924 Act, in the year 1924, or related to Congress' consideration or passage of the 1924 Act.

1938 Act included this purpose for metalliferous minerals as well. All of the changes effected by the 1938 Act on previous Indian mineral leasing acts were specified in the legislative history to the 1938 Act and made clear in the Act itself. None of those changes concerned existing tax authorizations.

The bill which became the 1924 Act was introduced at the request of the Department of Interior to cure specific problems in previous laws affecting oil and gas leasing on unallotted lands. Those problems were that Indian oil and gas were not being leased or developed up until that time because of the ten-year time limitation on mining leases under the Act of 1891, supra. Congress saw that this "absolutely impracticable" ten-year limitation for oil and gas leasing needed to be extended in order to

encourage development for the benefit of the Indians. See S. 2314, 68th Cong., 1st Sess., Vol. 65, Part 9, Cong. Rec. 8597 (May 15, 1924); S. 2314, 68th Cong., 1st Sess., Vol. 65, Part 6, Cong. Rec. 5492 (April 3, 1924). Congress was concerned that very frequently non-tribal tracts were developed adjacent to the tribal tracts, with the result of "drainage [from the tribal tract] in some instances." Id. The 1924 Act encouraged development of the tribal lands so that Indians could capture the benefit of the oil and gas, rather than lose the oil and gas to the adjacent non-tribal tracts being develop. The legislative history to the 1924 Act thus shows that Congress viewed the failure to develop Indian oil and gas as a loss to the Indians, not as a loss to would-be oil and gas developers who were non-Indian.

There are other indications that after passage of the 1924 Act Congress did not change its approach, but continued to view development of Indian resources to be advantageous to tribes. For instance, in considering the oil and gas leasing Act of March 3, 1927, n. 8 supra, Congress viewed royalty payments to Indians from the development of tribal natural resources to be of benefit to the Indians. As in the 1924 Act, taxation was permitted. Thus, again, Congress did not perceive taxation of royalties by states to be contrary in any way to the benefit which Indians would derive from oil and gas development. 68 Cong. Rec. 4573 (1927); 68 Cong. Rec. 4578 (1927). See Amici Curiae Brief in support of Petitioners. There is nothing in the legislative history of the 1924 Act or of other mineral leasing acts containing tax

consents to suggest that those acts were enacted, as the Ninth Circuit held, for the benefit of non-Indians urging that Indian lands be developed and opened for the benefit of non-Indians. 729 F.2d 1196 (Pet. App. 17).

There was nothing in the 1924 Act that prompted Congress to consider or pass the 1938 Act. Like the 1924 Act, the 1938 Act was designed to make development of Indian resources more attractive for the benefit of Indians, allowing Indians "to lease more lands so that Indians can have more income." S. 2638, 74th Cong., 1st Sess., Vol. 79 Part 7 Cong. Rec. 7815 (May 20, 1935). (S. 2638 was the predecessor bill to the 1938 Act. See discussion, infra, at 78.) This was to be accomplished by removing Indian leases from the provisions of the public land leasing laws and regulations

and subjecting leases to the consent of the affected Indians. E.g., letter from Commissioner Collier to Senator Thomas, dated July 29, 1937, attached hereto at App. 4, and letter from Secretary H. L. Ickes to Chairman Will Rogers, dated March 26, 1936, attached hereto as App. 5.

The legislative history of the 1938 Act shows that it was designed to cure specific ills resulting from Section 26 of the Act of June 30, 1919 [hereinafter "Section 26 of the 1919 Act"] dealing with mining of metalliferous minerals (but not oil and gas) on unallotted lands. Congress was detailed and specific in designating the existing provisions which it sought to change or eliminate. None of those "problem" provisions dealt with taxing powers of

the states.[17]

The major problem with Section 26 of the 1919 Act was that it permitted the leasing of tribal minerals without the consent of the tribes or of the Secretary of Interior. Section 26 thus did not conform to the I.R.A. provision (Section 16, Pet. App. 171) that tribes organized under the I.R.A. could prevent the leasing of their lands without their consent. (Pet. App. 337-338, 349.) See Vol. 79 Part 7 Cong. Rec. 7815, 74th Cong., 1st Sess. (1935).

A second problem with Section 26 of the 1919 Act which concerned Congress was that it subjected exploration, location

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17 See letter dated April 15, 1935, S. Rep. No. 614, (Pet. App. 333, 335-346), where the problems with the 1919 Act are itemized. See also the letter dated June 17, 1937, S. Rep. No. 985, (Pet. App. 344, 348-353).

and mining of metalliferous minerals on the affected unallotted lands to the public mining laws of the United States, creating serious impediments to mineral development of unallotted lands.

As the Ninth Circuit noted, 729 F.2d at 1198 n. 16 (Pet. App. 26), the predecessor to the bill which became the 1938 Act was S. 2638, 74th Cong., 1st Sess. (1935). That bill appears at App. 1-3, infra. It had first been introduced in 1934.[18] The goals of this unpassed bill, like those of S. 2689 which became the 1938 Act, were to correct the problems caused by Section 26 of the 1919 Act. See n. 17, supra.

The letters from the Department of

18 S. 3565, 73d Cong., 2d Sess. (1934), H.R. 9427, 73d Cong., 2d Sess. (1934).

Interior supporting the 1937 bill which became the 1938 Act, and the 1935 bill, for general mineral leasing on allotted lands (S. Rep. No. 614, supra, and S. Rep. No. 985, supra, Pet. App. 333, 344) went into detail about what S. 2638 and S. 2689 were to accomplish, namely to remove Indian mineral leasing from the general mineral laws of the United States, and to give the Department of Interior and various Indian tribes the authority to refuse mineral leases which they felt were not economically advantageous to the tribes.[19] See also

19 The Ninth Circuit concluded that a specific purpose of the 1938 Act was "to give the Indians the greatest return from their property." 729 F.2d at 1199 (Pet. App. 32), quoting S. Rep. No. 985, The quoted language followed the recitation of the obstacles to the Indians' getting a good return from leases of metalliferous minerals under the 1919 Act. Taxation was not one of these obstacles. See Pet. App. 344.

Vol. 79 Part 7 Cong. Rec. 8307, 74th Cong., 1st sess. (1935) and App. 3 and 4, infra. These letters indicated the intent to make it easier than it was under the 1919 Act for a lease applicant to lease unallotted land, (see, e.g., Pet. App. 336-337, 346-348), so that more lands could be leased "to greater advantage to the Indians in definite areas." (Pet. App. 341, 353).

The Ninth Circuit erroneously implied (without expressly holding) that the I.R.A., and therefore the 1938 Act, sought to reverse a 1924 policy of Congress to open Indian lands for increased non-Indian development. 729 F.2d at 1196 (Pet. App. 17). That was not the intent of Congress in passing the 1938 Act. The intent of Congress was to make it so leasing could not take place without the consent of the tribe, and to

get rid of the cumbersome, expensive, time-consuming requirements of Section 26 of the 1919 Act which inhibited mining development on affected lands.

The 1935 bill and the 1938 Act brought all mineral leasing matters in harmony with the I.R.A. by providing that unallotted lands on any Indian reservation (except those excluded) could be leased for all mining purposes for as long as the minerals lasted, by authority of the tribal council, subject to the approval of the Secretary of the Interior.

The Ninth Circuit implied that the congressional desire to increase tribal autonomy over leasing, as reflected in the I.R.A. and demonstrated by the 1938 Act, included a desire to repeal the taxation provision in the 1924 Act. 729 F.2d at 1197 (Pet. App. 22-23). However,

Congress' only concern relating to increased tribal autonomy was with respect to the need to allow tribes to authorize or prevent mineral leasing on their lands. In fact, a provision to allow organized tribes to conduct mining activities had been eliminated from the final version of the I.R.A. See n. 7, supra. Under the 1924 Act, tribal lands could not be leased for oil and gas mining without the consent of the tribe. The 1924 Act was already consistent with the later stated policy of the I.R.A. which was Congress' main concern in passing the 1938 Act.

In 1935, when the bill which was the predecessor to the 1938 Act was drafted, a tribal consent provision was included in the proposed bill (S. 2638), in the same way it appeared in the 1938 Act. The 1938 Act imposed specific requirements on

the leasing procedures that were not set forth in either the 1924 or the 1938 Acts. In addition, the 1935 bill had a provision repealing all acts inconsistent with it, while the 1938 Act changed the repealer to "all Act[s] or parts of Acts" inconsistent with the 1938 Act. (Emphasis supplied) See Section IB, supra. This modified repealer, which was ignored by the Ninth Circuit, made it clear in the 1938 Act that some portions of previous acts could survive the passage of the 1938 Act.

A comparison of the 1924 Act, the 1935 predecessor to the 1938 Act and the 1938 Act itself, reveals the exact changes made to the 1924 Act. There is no justification for the Ninth Circuit's imagining other changes or for implying that Congress intended to reverse a tax authorization which Congress did not

discuss at the time Congress specifically addressed problems with existing legislative provisions. Congress was remarkably detailed and specific in outlining what provisions of previous acts it sought to eliminate or change, as demonstrated by its attaching the supporting letters to the Senate Reports to S. 2638 and S. 2689. In addition, Congress was specific in itemizing new statutory provisions, such as bonding requirements, in the 1938 Act. It is thus absurd for the Ninth Circuit to conclude that there was another unmentioned provision which Congress sought to change in enacting the 1938 Act.

The 1924 Act's tax authorization was not perceived by Congress as being adverse to any of the goals of the 1938 Act. It was not a provision which

Congress sought to undo and reverse in the 1938 Act. It did not simply vanish with the passage of the 1938 Act. The Ninth Circuit's conclusion that the 1924 Act's tax authorization no longer exists for leases made after 1938 must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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November, 1984.

APPENDIX TO BRIEF OF PETITIONERS

S. 2638
74TH Congress, 1st Session
IN THE HOUSE OF REPRESENTATIVES
May 31, 1935
Referred to the Committee on Indian Affairs

AN ACT

To amend the law governing the leasing of unallotted Indian lands for mining purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, troupe [sic], or band of Indians under Federal jurisdiction may be leased by authority of the tribal council speaking for such Indians for not to exceed ten years for mining purposes, subject to approval of the Secretary of Interior and under such rules and

regulations as he may prescribe: Provided, that such unallotted Indian lands, other than lands of any of the Five Civilized Tribes and the Osage Reservation, subject to lease under the provisions hereof, may be leased at public auction by the Secretary of the Interior with the consent of the tribal council speaking for such Indians, for oil and/or gas mining purposes for a period not to exceed ten years and as much longer thereafter as oil and/or gas shall be found in paying quantitites, under such rules and regulations as the Secretary of the Interior may prescribe: And provided further, That the foregoing provisions shall not be construed to restrict the power of tribes, organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes

for the terms provided in this Act and in accordance with the provisions of any constitution and charter adopted under the Act of June 18, 1934.

SEC. 2. That section 26 of the Act of June 30, 1919 (41 Stat. 31), as amended by the Act of March 3, 1921 (41 Stat. 1231), and December 16, 1926 (44 Stat 922-923), and any other Acts inconsistent herewith, are hereby repealed.

SEC. 3. That this Act shall not apply to the Papago Indian Reservation in Arizona.

Passed the Senate May 13 (calendar day, May 28), 1935.

Attest: EDWIN A. HALSEY,

Secretary.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE COMMISSIONER OF INDIAN AFFAIRS
WASHINGTON

Commr.
JC

July 29, 1937

Hon. Elmer Thomas,

United States Senate.

Dear Senator Thomas:

The explanation which I made about the Indian leasing bill yesterday (S. 2689) was so incomplete that you might be without adequate information if questioned upon the floor. The essence of the bill is to bring all of this class of leases under the Indian leasing law and to subject the issuance of leases to the consent of the duly authorized tribal council. At present, certain classes of land, if leased at all, have to be leased under the public land leasing laws and regulations.

Sincerely yours,

/s/ John Collier

Commissioner.

THE SECRETARY OF THE INTERIOR
WASHINGTON

March 26, 1936

Hon. Will Rogers,

Chairman, Committee on Indian Affairs,

House of Representatives.

My dear Mr. Chairman:

Attention is invited to Senate 2638, which passed the Senate on May 28, 1935, and was referred to your committee on May 31. The bill relates to the leasing of unallotted Indian lands for mining purposes. This is a companion bill to H.R. 7661.

This legislation was recommended by

Department letter of April 15, 1935. The substitution of new provisions of law for section 26 of the act of June 30, 1919 (41 Stat. 31), as amended by the acts of March 3, 1921 (41 Stat. 1231) and December 16, 1926 (44 Stat. 922-923), is necessary to harmonize such leasing activities with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and the policy of the Government thereunder for the organization and rehabilitation of Indian tribes and tribal matters. A number of the tribes have already organized and others are in the process of organizing to take a more active part in the management and control of tribal interests, including the leasing of their lands. Section 26 of the act of June 30, 1919, as amended, under which any citizen of the United States may acquire vested mining rights on unallotted Indian lands

without tribal sanction or consent, is wholly inconsistent with tribal organization and participation in the management and use of tribal property.

I invite attention to the misspelled word in line 4, page 1 of the bill; "troupe" should be "group".

The urgency of this legislation leads me to request that it be given early consideration by your committee so that it may receive final action during the present session of Congress. The Acting Director of the Bureau of the Budget advised under date of April 5, 1935, that the legislation in question would not be in conflict with the financial program of the President.

Sincerely yours,

(Sgd.) Harold L. Ickes

Secretary of the Interior

App. 8

cc - Hon. Elmer Thomas,

Chairman, Senate Committee

on Indian Affairs

CORRECTED COPY

(12)

No. 83-2161

Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

STATE OF MONTANA, *et al.*,
Petitioners,
v.
BLACKFEET TRIBE OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER RESERVATION, PUEBLO OF LAGUNA, NEZ PERCE TRIBE OF IDAHO, CHEYENNE RIVER SIOUX TRIBE, AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. AS *AMICI CURIAE*

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INTEREST OF AMICI

Amici, except the Association on American Indian Affairs, are federally recognized Indian tribes with tribal governments recognized by the Secretary of the Interior. Each has a direct interest in the outcome of this case

because permitting states to tax the royalty interests of tribes in leases under the Act of May 11, 1938 will or may reduce the tribes' share of revenues from existing and future mineral development on their reservations. The Association on American Indian Affairs is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians.

Amici Assiniboine and Sioux Tribes are located on the Fort Peck Indian Reservation in Northeastern Montana. There is considerable oil and gas development on the Fort Peck Reservation. Both tribal and allotted lands are under lease and producing oil and gas. Tribal income from oil and gas production in fiscal year 1984 was in excess of $820,000. Development is ongoing, and total production and tribal income should increase in the future. Since Montana is the petitioner in this case, the Tribes can expect the state to attempt to tax the Tribes' royalty income if the state prevails here.

The Shoshone and Araphoe Tribes are located on the Wind River Reservation in Wyoming. Wind River is the only Indian reservation in the State of Wyoming. There has been oil and gas leasing on the Wind River Reservation since at least 1916. Today the Tribes earn a total of about 10 million dollars a year from tribal oil and gas leases. 85% of this income, by Act of Congress, is distributed per capita to the people and 15% is reserved to the tribal government.[1] Wyoming has never sought to tax tribal royalties, but can be expected to do so if this Court rules for petitioner in this case.

The Pueblo of Laguna is located in New Mexico. The Pueblo previously has leased lands for the mining of uranium, and in the future will consider other leases for the mining of such minerals as may be found under its

[1] 25 U.S.C. § 613 (1982).

lands. The Pueblo wishes to respond to the arguments of the Petitioner as well as those of *amicus curiae* the State of New Mexico in order to protect the economic viability of any future mineral development activities within Pueblo land.

The Nez Perce Tribe of Idaho is located on a reservation in Idaho. The Tribe has leased for many years certain tribal lands for the mining of limestone, and will consider other leases for the mining of such minerals as may be found under its lands. The Tribe wishes to respond to the arguments of the Petitioner as well as those of *amicus curiae* the State of Idaho in order to protect the economic viability of any future mineral development activities on tribal lands.

The Cheyenne River Sioux Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982), and located on the Cheyenne River Sioux Reservation in the State of South Dakota. Although no tribal lands currently are the subject of mineral leases, the Tribe wishes to protect the economic viability of any future mineral development activities on tribal lands. The Tribe filed a brief *amicus curiae* with this Court in *Solem* v. *Bartlett*, No. 82-1253, decided Feb. 22, 1984.

The Association on American Indian Affairs, Inc. is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Solem* v. *Bartlett*, No. 82-1283, decided Feb. 22, 1984, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968), and

Warren Trading Post Co. v. *Arizona Tax Commission*, 380 U.S. 685 (1965).

This brief is filed with the written consent of all parties to the litigation. The consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

In this case Montana seeks to tax the tribal royalties from oil and gas production on tribal land within the Tribe's Reservation. It is not an attempt to tax minerals owned by private persons or the oil companies' share of tribal minerals. This Court has held that States have no power to impose such taxes in the absence of an express, unambiguous waiver of the Tribe's immunity from state taxation.

There is no such waiver for leases under the 1938 Mineral Leasing Act. The 1938 Act does not by its terms authorize state taxation of minerals produced from leases under it. There is no general act authorizing state taxation of Indian minerals. The tax immunity waiver of the 1924 Act is a proviso to the leasing authority of that Act, and waives tax immunity only for leases under that Act. The 1924 Act does not cover all Indian lands and the exceptions in it are not congruent with those in the 1938 Act. The 1938 Act also contrasts with the contemporaneous Act of June 26, 1936, 25 U.S.C. §§ 501-509 (1982) which expressly authorizes Oklahoma—but no other state—to tax gross production of lands acquired under it. 25 U.S.C. § 501 (1982). Finally, the Indian Mineral Development Act of 1982, 25 U.S.C.A. § 2100-2108 (West 1983) specifically provided that nothing in it shall affect or be affected by any other Indian mineral leasing act. The pattern is clear. Each mineral leasing authority is self-contained. A lease made under any act is governed by that act, and not other mineral leasing authorities.

A waiver of the tax immunity in the 1938 Act cannot be inferred from the silence of that Act.

Contrary to the impression Montana and the *amici* states try to give, most states have not tried to tax tribal royalties unless the lease in question is made under a statute specifically authorizing such taxation. Wyoming, Idaho, and California do not tax tribal royalties. Alaska is governed by a separate regime for Native property under the Alaska Native Claims Settlement Act. A 1977 Interior Department memorandum shows that in 1977 only Montana and New Mexico were attempting to tax tribal royalties under 1938 Act leases, and New Mexico stopped after the 1977 Solicitor's opinion that such taxes were not allowed.

The primary responsibility for providing governmental services on an Indian reservation belongs to the tribe governing the reservation and to the federal government. In particular, regulation of oil and gas matters on Indian land is done by the federal and tribal governments. States have little or no role, lacking jurisdiction over oil and gas matters on Indian reservations. They are thus also relieved of the expense of such regulation. The State role in providing general services on Indian reservations is similarly limited; and where the state does provide services it often does so with federal money. The net result is that collection of state severance taxes on tribal royalties is not justified by services rendered by the states.

One of the purposes of the 1938 Act was to end the confusion in earlier conflicting and incomplete acts and to achieve uniformity in tribal mineral leasing. That purpose is reflected in the legislative history and in the structure of the Act. Applying the tax authorizations of the 1924 Act, the 1927 Act and other acts to leases under the 1938 Act would defeat this purpose. Those tax authorizations vary in scope and detail. Keeping those au-

thorizations alive under the 1938 Act would reintroduce, in the state tax area, all of the confusion of the hodgepodge of old statutes. If Congress had intended in 1938 to waive tribal tax immunity it would have adopted a specific, uniform, tax authorization.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MONTANA CANNOT TAX THE BLACKFEET TRIBE'S SHARE OF INCOME UNDER 1938 ACT OIL AND GAS LEASES.

In this case Montana seeks to justify a tax against an Indian tribe's royalty on the production of nonrenewable minerals on tribal land within the Tribe's reservation. This is not an attempt to tax minerals on land owned by private persons within a reservation. Nor is it an attempt to tax an oil company's share of tribal minerals. It is an attempt by one sovereign—the State of Montana—to tax the direct income of another sovereign—the Blackfeet Tribe—from a resource that when once mined is gone forever.

The State has no power to engage in such taxation in the absence of a waiver of the Tribe's immunity by Congress. As the court held in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973):

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n., supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

See also, *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 175 (1973).

A. The standard for finding a waiver of tribal tax immunity is that the waiver be unambiguous.

This Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), set the standards for finding a waiver of a tribe's immunity from state taxation. There the Court was asked to hold that § 4 of Public Law 280,[2] which subjected Indian tribes to the civil and criminal jurisdiction of certain states, also subjected property of tribal members located on reservations to the states' taxing authority. The Court cited the familiar standard of interpretation that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 392. The Court held that this "principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Id.*

It is that standard that must be applied here. The basic starting point is that a state has no authority to tax a tribe's royalty on production of its own minerals. If Congress has waived the tribe's tax immunity it must be a clear and precise waiver, not an implication from an ambiguous statute. Montana has the burden of showing such a clear and precise waiver. We submit that there has been no such waiver.[3]

B. Congress has not waived tribal immunity from state taxes on tribal royalty interests under 1938 Act mineral leases.

Tribes do not have authority to sell or lease their land except as provided by acts of Congress. *Oneida Indian*

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[2] Act of August 15, 1953, c. 505, 67 Stat. 589. Section 4 of the Act is codified at 28 U.S.C. § 1360 (1982). Amendments made in 1968 are codified at 25 U.S.C. §§ 1321-1326 (1982).

[3] The presumption against a waiver of immunity should be even stronger when, as here, a state seeks to tax a nonrenewable resource from trust land. Cf. Squire v. Capoeman, 351 U.S. 1 (1956).

In *Squire*, despite the plenary authority of Congress to tax within an Indian reservation, and the general applicability of federal in-

Nation v. *County of Oneida*, 414 U.S. 661, 667-676 (1974); 25 U.S.C. § 177 (1982). A lease of Indian land is therefore based on an act of Congress that permits such a lease. See 25 U.S.C. § 177; *see also*, discussion in F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 528-542. The 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (1982), is such an authorization and numerous mineral leases have been made under it. Not one word in the Act permits state taxation of leases made under the Act or makes such taxation a condition for permitting the lease. Nor does the legislative history of the Act show an intent to authorize taxation of royalties produced under the Act. The legislative history is silent on this.

The 1938 Act, though of wide application, does not purport to cover all Indian lands. Section six lists lands to which it does not apply. Where those lands are concerned one must refer to the statutes permitting them to be leased to determine the extent of leasing authority. Thus there is no single statute on mineral leasing. Each lease is governed by the statute under which it is made.

Similarly, there is no general statute permitting states to tax tribal revenues from leases. The 1924 leasing statute, 25 U.S.C. § 398 (1982), does contain a permission to tax, but only as a proviso to that leasing statute. The proviso does not purport to be a general waiver of tribal tax immunity, but only a condition for leasing under that statute. Indeed the 1924 Act, like the 1938 Act, does not cover all Indian lands, and the exceptions in one

come tax laws to Indians, the Court held that income from timber cutting on allotted lands was not subject to federal income taxation. (The United States never attempted to tax timber cutting on tribal lands). The Court relied on the fact that

> "[r]espondent's timber constitutes the major value of his allotted land * * *. Once logged off, the land is of little value." *Id.*, at 10.

act are not congruent with the exceptions in the other.[4] To apply the specific tax provisions of the earlier act to the later one would preserve and add to the haphazard state of things Congress hoped to obviate with the 1938 Act. *See* discussion in Section IV, *infra*.

The 1938 Act contrasts not only with the 1924 Act, but with the contemporaneous Act of June 26, 1936, c. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 501-509 (1982), which permits acquisitions of grazing land for Indian tribes and specifically provides that the state of Oklahoma —but not any other state—may tax the gross production of oil and gas from such lands. 25 U.S.C. § 501 (1982). Thus Congress, in the 1930's, when it wanted to waive a tax immunity, did it precisely. Not only does the 1938 Act fail to expressly waive tribal immunity, the express waiver in the 1936 Act argues against a tacit waiver in the 1938 Act.

Finally, Congress, in its most recent legislation on Indian mineral leases, has tried expressly to avoid the application of one act to the provisions of another. In the Indian Mineral Development Act of 1982, 25 U.S.C.A. §§ 2101-2108 (West 1983) which provides more flexible arrangements for mineral production than ordinary leases, Congress—probably to avoid litigation such as this —specifically provided that nothing in the Act shall affect or be affected by any other Indian mineral leasing act.

[4] The 1924 Act is an amendment to an 1891 Act that allows mineral leasing on lands "bought and paid for" by the Indians. The meaning of that phrase has never been clear. It is not a term of art in Indian law. See discussion at 20-21, *infra*. The exceptions in the 1938 Act are the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Wind River Reservation in Wyoming, the Osage Reservation in Oklahoma, and the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma. 25 U.S.C. § 396f (1982).

The pattern over many years is clear. Each mineral leasing authority is self-contained. A lease made under any act is governed by the provisions of that act, including the tax provisions, and not by provisions from other mineral leasing authorities. Tribes, states and oil companies are all used to leases and other mineral development agreements being governed by the act under which they are made.[5]

Montana's argument is that a tribe's royalty from a lease under the 1938 Act can be taxed by the state because the 1938 Act—while containing no waiver of tax immunity as in the 1936 Act—does not specifically repeal the 1924 Act waiver of tax immunity.

For the State to prevail requires the Court to find an inference from silence that a tribe's tax immunity has been waived. This argument, we submit, does not pass the test set forth by this Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), a test consistent with 150 years of the Court's interpretation of Indian statutes and treaties. The 1938 Act is a "statute[] passed for the benefit of dependent Indian tribes." It is "to be liberally construed, doubtful expressions being resolved in favor of the Indians." That we are dealing with an argument that a tax immunity has been waived by Congress does not diminish the application of the rule. To the contrary, "this principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Bryan* v. *Itasca County*, *id.*, at 392.

[5] In this context, the meaning of the repealer clause of the 1938 Act seems clear. Act of May 11, 1938, c. 198, § 7, 52 Stat. 347, 348. In the absence of a repealer clause the 1938 Act might be construed as nonexclusive, leaving tribes and the Secretary the option of leasing under other statutes, such as the 1924 Act, where it suited them. This would be inconsistent with the policy of uniformity reflected in the 1938 Act. See Section IV, *infra*.

On the other hand, an outright repeal of existing statutes might be interpreted as requiring application of the 1938 Act to existing leases under the earlier statutes.

II. THE ATTEMPT TO TAX TRIBAL ROYALTY INCOME UNDER THE 1938 ACT LEASES IS LARGELY A MONTANA PHENOMENON.

Contrary to the impression Montana and the *amici* states try to give, most states have not tried to tax tribal royalties unless the lease in question is made under a statute specifically authorizing such taxation. Indeed, Montana's attempts to tax the royalty interests of Indian tribes in Montana under the 1938 Minerals Leasing Act are virtually unique.

The states of New Mexico, Arizona, Alaska, California, Idaho, Utah and Wyoming have filed an *amicus* brief in support of Montana. They state that "[o]f the amici states, New Mexico and Utah do not impose their taxes on the royalty share." *Brief* at 23. The impression is given that the other states do. But the *amici* states cite no authority to show that any of the other states (beside Montana) attempt to tax tribal royalties from oil and gas production. In fact, so far as we can determine, none of the *amici* states tax tribal royalties under 1938 Act leases.

Two of the *amici tribes*, the Shoshone and Arapahoe Tribes of the Wind River Reservation, are the only tribes in Wyoming. Oil has been produced on the Wind River Reservation by leases made under the 1891 Act, the 1916 Act and the 1938 Act. Wyoming has had severance taxes at least since 1920. Wyo. Stat. §§ 2906-2911 (1920 Comp.). It has been the uniform practice in Wyoming for oil companies to pay state taxes on their own share of royalties, but not on the tribal share. We know of no instance in which the Tribes or oil companies have paid state taxes on the Tribes' share of royalties.[6]

[6] The Wyoming tax on the value of oil produced used to support the state oil and gas conservation commission expressly exempts

Another of the *amici* states, Idaho, also does not tax the tribal share of mineral royalties. Thus Idaho has never sought to tax the tribal share of mineral development on the reservation of *amicus* Nez Perce Tribe.

California, in addition to joining in the general states' *amicus* brief, filed a separate *amicus* brief. California states that "unlike Montana and the other amici states, [it] does not have a mineral severance tax, and little if any Indian trust land in California is subject to mineral leases executed under the 1924 and 1938 Acts. Whether Indian mineral royalties from such leases may be taxed by the states is therefore not a matter of direct present concern to California." *Brief* at 2-3. California's concern is that the Court not decide this case so broadly as to invalidate its taxes on non-Indian purchasers of Indian timber. *Id.*, at 1-2.

Alaska has a separate regime for native property. Native regional corporations and village corporations largely replace the more traditional Indian tribes and trust property. The Alaska Native Claims Settlement Act (ANCSA) provides explicitly and in detail what interests in real estate or minerals shall or shall not be subject to state and local taxation. 43 U.S.C. § 1620 (1982).

In a Memorandum of March 13, 1978 to the Associate Solicitor for Indian Affairs from the Assistant Secretary of Indian Affairs, the area offices of the Bureau reported to the Secretary on whether "taxes are paid on tribal royalty income from 1938 Act leases." [7]

The survey shows that the only states attempting to collect taxes on the tribes' royalty share of 1938 Act

"the interest of any Indian or Indian tribe in any oil or gas or in the proceeds thereof, produced from land subject to the supervision of the United States." Wyo. Stat. § 30-5-116(b)(ii).

[7] We are lodging a copy with the Clerk and mailing copies to the parties and other *amici*.

leases were Montana and New Mexico. New Mexico stopped after the Solicitor's 1977 opinion that such taxes were not owed. Brief of the State of New Mexico, *et al.*, as Amici Curiae 23 n.23. According to the report, Arizona, for instance, like Wyoming, collected severance taxes on the oil companies' share of production from tribal land (often seven-eighths of the production) but not on the tribe's share.[8]

In sum, it has been the common practice of the states not to attempt to tax a tribe's royalties on production of its own minerals except under statutes specifically authorizing such taxation.

III. TAXATION OF TRIBAL ROYALTIES IS NOT JUSTIFIED BY GOVERNMENTAL SERVICES PROVIDED BY THE STATES TO THE TRIBES.

The primary responsibility for providing governmental services on an Indian reservation belongs to the Tribe governing the reservation and to the federal government. Thus, as this Court has had occasion to recognize in the past, the states have little to do with services on Indian reservations. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 150-151 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 476 (1976); *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 173 n.12 (1973); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690-91 (1965).

Only taxes on *tribal* royalties are at issue here. Taxes on royalties of individuals, or on oil companies' shares

[8] Memorandum of March 13, 1978 to Associate Solicitor for Indian Affairs from Assistant Secretary—Indian Affairs, p. 3; Personal Communication from Anita Voght, Office of the Solicitor, Department of the Interior.

The States' *amicus* brief says that Arizona collects a tax from the tribal share pursuant to Industrial Uranium Co. v. State Tax Commission, 367 P.2d 1013 (1963). That case held that a tax based on the full value of uranium production could be imposed on the lessee, not on the tribe. *Id.* at 1014.

of production are not at issue. As to the Tribe, Montana is in the anomalous position of seeking to tax an entity whose existence and role as primary provider of governmental services on the reservation relieves the state of significant burdens and expense. The State provides no services to Indian tribes which would justify or support this tax.

Oil and gas development on Indian reservations is regulated by the Department of the Interior, acting through the Bureau of Land Management. 43 C.F.R. Part 3160.[9] The Interior regulations are comprehensive. They govern spacing, location and drilling of wells, 43 C.F.R. § 3162.-3-1, subsequent well operations, 43 C.F.R. § 3162.3-2, recordkeeping and reporting, 43 C.F.R. § 3162.4-1 to 3162.4-3, and well abandonment, 43 C.F.R. § 3162.3-4. Operators are required to comply with environmental standards to prevent damage to the surface, subsurface resources, and groundwater supplies, and to take precautions to prevent blowouts, fires, and spills. 43 C.F.R. § 3162.5-1 and § 3162.5-2. Additionally, the regulations impose security requirements to prevent theft or loss of oil or gas. 43 C.F.R. § 3162.7-4.

In addition to this comprehensive federal regulation, some tribes have established their own agencies to oversee oil and gas operations on their reservations. For example, the Shoshone and Arapahoe Tribes have, since 1981, jointly maintained a Minerals Department on the Wind River Reservation. That Department had a budget of $146,000 in 1984. Shoshone Business Council, Resolution No. 5452 (Jan. 24, 1984); Shoshone Business Council, Budget Narrative CY 1984. In addition, the Shoshone Tribe funds its own oil and gas commission, with a 1984 budget of more than $40,000, *id.*, and has its own attorneys and mineral consultants to negotiate leases, arrange for competitive bidding for leases and enforce compliance with lease terms. At Fort Peck, the tribes have had a minerals office since about 1976. This office had a 1984 budget of approximately $200,000. Personal Communication from Larry Wetsit, Director, Fort Peck Minerals Office (December 10, 1984). Fort Peck similarly provides its own attorneys and mineral consultants.

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[9] 43 C.F.R. Part 3160 used to be codified as 30 C.F.R. Part 221 (1982). *See* 47 Fed. Reg. 47758 (1982); 48 Fed. Reg. 35641 (1983); 48 Fed. Reg. 36583 (1983). The standard lease form used for leases under the 1938 Act specifically referred to and required compliance with 30 C.F.R. 221. These regulations also govern leases on allotted lands. 43 C.F.R. § 3160.0-1.

By contrast, the states have almost no role in oil and gas regulation on reservations. The Montana Oil and Gas Board by its own admission has no jurisdiction over Indian trust lands.[10] *Assiniboine and Sioux Tribes* v. *Board of Oil and Gas Conservation*, No. CV-83-79-GF (November 7, 1983) (consent judgment); *See Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F.Supp. 909 (D. Mont. 1963), *reversed on jurisdictional grounds sub nom. Yoder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). Similarly, the State of Wyoming does not exercise or claim jurisdiction over oil and gas production on Indian lands. Wyoming recently correctly declined to assert jurisdiction under the Safe Drinking Water Act, 42 U.S.C. 300f-300j-10 (1982), to regulate underground water injection for oil and gas and other purposes on the Wind River Reservation. *See* 48 Fed. Reg. 40098, 40100 (1983). As a result the EPA administers the underground injection control program

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[10] One of the taxes directly at issue in this case, the oil and gas conservation tax, is an earmarked tax to support the activities of the Montana Board of Oil and Gas Conservation. Montana Code Annotated, § 82-11-131. If this tax is upheld, Montana will be taxing Indian tribes specifically to support a state regulatory agency which lacks jurisdiction over Indian land, an ironic result indeed.

on the Wind River Reservation. *Id.* at 40099.[11] In fact, the states do not have any jurisdiction over environmental programs, related to mineral development or otherwise, on Indian reservations. The EPA has realized this, and recently issued a policy statement recognizing tribal governments as the primary regulators of reservation environments. Environmental Protection Agency, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984). In short, the states lack jurisdiction to regulate oil and gas development on Indian trust lands. Such regulation is the responsibility of the United States and the tribes. The states are thus relieved of the expense of such regulation.[12]

Nor are taxes on tribal royalties justified by other general services provided by the state. Again, the tribes themselves and the federal government are the primary providers of governmental services to reservation Indians. The Bureau of Indian Affairs, and tribal governments operating under BIA contracts, run schools for Indian students on many reservations. F. Cohen, *Handbook of Federal Indian Law* 678-83, 694-95 (1982 ed.). The Indian Health Service provides all the basic health care for reservation Indians. *Id.* 698-700. The Bureau of Indian Affairs provides general assistance and other welfare benefits. *Id.* at 702-03. Low income housing on Indian reservations is also the responsibility of the federal government and Indian Housing Authorities chartered under tribal law. *Id.* at 706-11.

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[11] Montana elected not to implement an underground injection control program at all. Consequently EPA administers the UIC program throughout the state of Montana. *Id.*

[12] The Brief of the States of New Mexico, *et al.*, as Amici Curiae at 19-20, suggests that states conduct onsite inspections of mining operations on Indian lands. It cites no specific instances. We question whether the states have jurisdiction to conduct such inspections. In any event no such inspections occur on trust lands on the reservations of *amici*.

The state role is limited. And when the state does provide services, it often does so with federal money. For example, no fewer than four federal programs support state and local educational services for Indians. The Johnson O'Malley Act, 25 U.S.C. § 452 (1982), which was passed in 1934, only four years before the 1938 Act, was designed to "accommodate unmet financial needs of school districts related to the presence of large blocks of nontaxable Indian-owned property in the district * * *." 25 C.F.R. § 33.4(b) (1958 ed.).

The local school districts now receive major support under the Federally Impacted Areas Act, 20 U.S.C. §§ 236-244 (1982). That act provides support to school districts which provide education for children residing on federal property, and expressly includes Indian trust lands. 20 U.S.C. § 244 (1982). Johnson O'Malley funding is used to fund additional programs to meet the special needs of Indian students. F. Cohen, *Handbook of Federal Indian Law* 684-88 (1982 ed.).

School systems may also receive funds under the Indian Education Act, 20 U.S.C. §§ 241aa-241ff (1982). Finally, school districts may receive funds under the School Facilities Construction Act of 1953, 20 U.S.C. §§ 631-647 (1982), for the construction of schools on or near Indian reservations. Thus capital as well as operating expenses of state and local education for Indian children, if such services are provided at all, are federally subsidized.

The net result is that the tribal and federal governments provide, and thereby relieve the state of providing, services which cost considerably more than any severance tax on tribal royalties would collect in revenue.

For example, the tribal royalties from oil and gas leases at Fort Peck in fiscal year 1984 totaled $828,711. Department of the Interior, Minerals Management Service, Financial Distribution Report, Producing Oil and Gas Leases, BIA, Fort Peck Agency Office, 1984 Fiscal

Year Summary. If 100% of this royalty is retained by the Tribe it does not suffice to provide the services needed by tribal people. In fiscal year 1984 the Fort Peck Agency of the Bureau of Indian Affairs budgeted $680,000 for law enforcement and tribal courts, about $1.4 million for social services and welfare, about $147,000 for employment development and vocational training, about $229,000 for road maintenance, and about $124,000 for housing. Bureau of Indian Affairs, Fort Peck Agency F.Y. 1984 Allocation. This budget for governmental services totaling in excess of 2.5 million dollars was expended either by the BIA or by the tribal government. In addition, the Indian Health Service of the federal government in fiscal year 1984 provided or funded medical services to Indians of Fort Peck in excess of 2.8 million dollars. Personal Communication from Administrative Officer, Indian Health Services, Fort Peck Indian Reservation (December 5, 1984).

The State of Montana and its local subdivisions received $191,662 in Johnson O'Malley funding for educational services it provides at Fort Peck. Personal Communication from Vernon Belguard, Bureau of Indian Affairs, Billings Area Office, Office of Education (December 5, 1984).[13] Thus the total tribal and federal services at the Fort Peck Reservation are many times larger than the *total* tribal royalty. If Indian tribes are ever to obtain self-sufficiency there is no room for state taxation of tribal royalties.

Similarly at Wind River, the total fiscal year royalty income for both the Shoshone and the Arapahoe Tribes was $10,840,379. Department of the Interior, Minerals

[13] In addition to Johnson O'Malley funds for educational services actually provided, the State of Montana has an administrative grant of $20,000 to support its Office of Indian Education. *Id.*

Amici do not know how much federal funding the State and local governments receive under other programs on account of educational or other services to Indians at Fort Peck.

Management Service, Financial Distribution Report, Producing Oil and Gas Leases, BIA, Wind River Agency Office, 1984 Fiscal Year Summary. Of this amount 85% is required by law to be distributed per capita to members of the two tribes. 25 U.S.C. § 613 (1982). This distribution itself reduces the need for state services such as welfare by providing income to tribal members. The 15% remaining for tribal government is approximately $1.6 million.

The 1984 calendar year budget for the Shoshone Tribe includes approximately $98,000 for welfare and general assistance, $12,000 for fire protection, $82,000 for education (scholarships and on-the-job training), $30,000 to operate a nursing home for tribal members, $148,000 to operate three community centers, and $15,000 for upkeep of the tribal cemetery. Shoshone Business Council, Resolution No. 5452 (Jan. 24, 1984). Including all costs of tribal government the total tribal budget for 1984 is $2,140,851, plus an additional $267,146 for the Shoshone share of joint programs with the Arapahoe Tribe. *Id.*

The Arapahoe Tribe provides similar governmental services. The total budget for 1984 is $1,805,000 including the Arapahoe share of joint programs with the Shoshone Tribe. Arapahoe Business Council, Resolution No. 5425 (Jan. 21, 1984).

Finally, the federal government provides extensive services on the Reservation. The Indian Health Service alone provides nearly $5,915,000 in health care services at Wind River. Personal Communication from Administrative Officer, Indian Health Services, Wind River Reservation (December 5, 1984). The State and local governments receive about $136,000 in Johnson O'Malley funding alone for educational services to Indian children.[14]

[14] *Amici* do not know how much federal funding Wyoming, and its local governments, received under other programs on account of educational or other services to Indians at Wind River.

Bureau of Indian Affairs, Budget Justification, F.Y. 1985 at 54.

Thus, the services provided by the tribes and the federal government cost in excess of 7 million dollars. The cost of these services is more than four times the tribal governmental share of the Tribes' royalties from oil and gas leases. These are services the state and local governments are not required to provide. Wyoming's severance taxes total about 13.5%.[15] If these taxes were applied to the Tribes' income of $10.8 million, 15% of which goes to tribal government, the state would be collecting a sum only slightly less than the entire oil income received by the tribal government.

In short, services on the Reservation are provided by the tribal government and the United States. The state is relieved of this burden both by federal programs and by tribal programs financed by royalty income. To permit a state to tax the tribes' own royalties allows it to tax the very funds that save it and the United States from further burdens of service. No such intent can be found in the 1938 Act or inferred from it. Indeed the 1938 Act was passed after Congress had provided for the revitalization of tribal governments in the 1934 Indian Reorganization Act. There is no reason to assume that Congress in the 1930's intended to allow states to tax away the tribes' few sources of income, while reestablishing tribal governments as the governments of the reservations.

IV. THE 1938 ACT POLICY OF UNIFORMITY IN MINERAL LEASING WOULD BE DEFEATED IF TAX AUTHORIZATIONS FROM OTHER STATUTES ARE APPLIED TO THE 1938 ACT.

One of the purposes of the 1938 Mineral Leasing Act was to end the confusion in earlier conflicting and incomplete acts. From 1875 to 1924 Congress by special acts authorized leases on eleven separate reservations. *See* F. Cohen, *Handbook of Federal Indian Law* 327 (1942 ed.). Beginning in 1891, Congress also enacted a variety of more general leasing acts, which authorized leases of various minerals on various tribal lands.

It was to clear away the confusion resulting from this multiplicity of statutes and establish a uniform policy applicable to the majority of tribal lands that the 1938 Act was enacted. As the then Secretary of the Interior put it:

> Under section 26 of the act of June 30, 1919 (41 State. 31), as amended, leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 28, 1891 (26 Stat. 783), as amended May 29, 1924 (43 Stat. 244) leases for oil, gas, and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian Reorganization Act, approved June 18, 1934 (48 Stat. 934), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years. There is at present no law under which Executive order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. *One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.*

Letter of June 17, 1938, from Charles West, Acting Secretary of the Interior to the President of the Senate and

[15] *See* Wyo. Stat. § 39-6-302; Wyo. Stat. § 39-2-402; Wyo. Stat. § 30-5-116(b)(ii). The exact taxes depend on the amount of the mill levies by county and local governments pursuant to Wyo. Stat. § 39-2-402.

the Speaker of the House, reproduced in S. Rep. No. 985, 75th Cong., 1st Sess. 1-2, and H. Rep. No. 1872, 75th Cong., 3d Sess. 1 (emphasis added).

This quest for uniformity is also reflected in the structure of the Act. The 1938 Act is a detailed leasing statute which incorporates provisions from earlier statutes as appropriate,[16] but also contains provisions which had been left to administrative regulation or executive discretion in earlier statutes.[17] Where Congress felt particular circumstances overrode the need for uniformity, lands were specifically exempted from its provisions. 25 U.S.C. § 396f (1982).

Applying the tax authorizations of the 1924 Act, the 1927 Act and other acts to leases under the 1938 Act would reintroduce, in the state tax area, all of the variety and confusion of the hodgepodge of old statutes. For example, the scope of the tax authorization in the 1924 Act depended on the meaning of the phrase "lands occupied by Indians who have bought and paid for the same" in the Act of February 28, 1891, c. 383, § 3, 26 Stat. 795, codified at 25 U.S.C. § 397 (1982). That phrase is obscure to say the least, and its meaning never has been authoritatively determined.[18] It has been interpreted to mean all treaty reservations. Letter of June 17, 1937 from Charles West, *quoted supra*, at 19. On the other hand, the phrase was used in the 1880's to distin-

[16] For example, the maximum term of the lease—10 years and so long thereafter as minerals are produced in paying quantities—and the requirement of public auctions, 25 U.S.C. §§ 396a, 396b, are similar to requirements of the 1924 Act. 25 U.S.C. § 398 (1982).

[17] E.g., provisions regarding performance bonds, 25 U.S.C. § 396c, and unit agreements, 25 U.S.C. § 396d.

[18] In British American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164 (1936), this Court noted the agreement of the parties (which did not include the Blackfeet Tribe) that the land on the Blackfeet Reservation was "bought and paid for."

guish lands in Indian country (now Oklahoma) purchased by various tribes from the Cherokee Nation from normal Indian lands, whether held by treaty or executive order. *E.g.*, Sen. Ex. Doc. No. 17, 48th Cong., 2d Sess. (1885). Nor is it clear that the phrase would apply to lands for which the Indians gave *no* consideration, even if those lands are protected by a treaty. Moreover, the phrase was probably stretched beyond its intended meaning in the early part of this century because of the absence of other leasing authority. The sooner the 1891 statute is allowed to die a natural death the better.

The confusion created by keeping the 1924 Act alive (except perhaps for leases made under it) is compounded because the scope of the taxation authorization in the 1924 Act varied from that contained in the 1927 Act authorizing leasing on Executive Order Reservations. The 1924 Act permitted taxation of "the production of oil and gas and other minerals on such lands [i.e., lands bought and paid for and leased under the 1924 Act]" and authorized payment of such taxes by the Secretary of the Interior from tribal royalties. 25 U.S.C. 398 (1982). By contrast the 1927 Act permitted taxation not only of royalties but of "improvements," "rentals" and "bonuses," 25 U.S.C. § 398c (1982), while the 1924 Act did not. If the 1938 Act tacitly incorporated these provisions, did it incorporate two conflicting tax statutes, or retain accidental differences for reservations of different origin?

In sum, if the tax authorizations of the 1924 Act and the 1927 Act are tacitly included in the 1938 Act the taxability of 1938 Act leases would depend on whether the lands in question were "bought and paid for," were on an Executive Order Reservation or were neither and whether the tax was within the scope of the particular authorization statute relied upon. All of the complications of the many different leasing authorities would not only be preserved for leases under those acts but would be imported into the 1938 Act, contrary to its purpose of

achieving uniformity for leases subsequent to its enactment.

If Congress had intended that 1938 Act leases be subject to state severance taxes it could easily have selected a tax provision from an earlier statute, or drafted a new one, and expressly incorporated it, as it did with other provisions of the 1938 Act.

CONCLUSION

The Ninth Circuit was correct in holding that the 1938 Act does not make the state tax authorization of the 1924 Act applicable to 1938 Act leases. The decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1984

STATE OF MONTANA, ET AL., PETITIONERS
v.
BLACKFEET TRIBE OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the State of Montana may tax the Blackfeet Tribe's royalty interest under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2161

STATE OF MONTANA, ET AL., PETITIONERS

v.

BLACKFEET TRIBE OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has an interest in this case arising from its special relationship with the Indian tribes. *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938). In addition, the Court's decision concerning a State's power to tax the royalty income of an Indian Tribe under leases issued pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 *et seq.*, will have a direct bearing on the achievement of the purposes of that Act and the congressional goals of self-government and economic self-sufficiency embodied in the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984 *et seq.*, and more recent legislation, such as the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.* See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 & n.10 (1980).

STATEMENT

A. The Leasing Statutes

This case concerns the authority of the State of Montana to impose taxes on the royalty interest of respondent Blackfeet Tribe of Indians under leases for the production of oil and gas on unallotted lands on the Tribe's Reservation. The leases were issued pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* The 1938 Act does not contain a statutory authorization to tax leases issued under that Act. The State instead relies on a 1924 statute that permitted the Secretary of the Interior to lease unallotted lands for mining purposes; that Act contained a proviso that expressly authorized the States to tax both the lessee's interest in oil and gas production and the Tribe's royalty interest. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398 *et seq.*

The 1924 Act applied to unallotted land on Indian reservations (other than lands of the Five Civilized Tribes and the Osage Reservation in Oklahoma) that were "subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 [26 Stat. 795]." The 1891 Act mentioned in the 1924 Act was an amendment to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.*, which had been passed only four years earlier. The proviso to Section 3 of the 1891 Act, now codified at 25 U.S.C. 397, states that "[w]here lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments," they may be leased, by authority of the tribal council, for a period of up to 5 years for grazing purposes or 10 years for mining purposes, subject to approval by the Secretary of the Interior.

In *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159, 161-163 (1936), the Court held that the 1891 Act and the 1924 amendment thereto applied to land in reservations created by treaty or statute, but the Court indicated that those Acts did not apply to reservations created by Executive Order. Indeed, in 1927, Congress had enacted a separate statute permitting the leasing

of unallotted lands on Executive Order reservations for oil and gas mining purposes, with the consent of the Tribe concerned, in accordance with the provisions of the 1924 Act. The 1927 Act also expressly authorized state taxation of the lessee's income and property as well as rentals, bonuses, and royalties received by the lessor Tribe. Act of Mar. 3, 1927, ch. 299, §§ 1, 3, 44 Stat. 1347, 25 U.S.C. 398a, 398c. A prior statute passed in 1919 had permitted the Secretary of the Interior, even without the consent of the Tribe concerned, to lease unallotted lands on Executive Order and other reservations in specified western States, in the same manner as lands are leased on the public domain, for gold, silver, copper and other minerals except oil and gas. Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, 25 U.S.C. 399. The 1919 Act expressly stated that it did not affect the right of a State or locality to levy and collect taxes "upon improvements, output of mines, or other rights, property, or assets of any *lessee*" (§ 26, 41 Stat. 33 (emphasis added)) but it did not permit taxation of the lessor tribe's royalty income or other interests.

B. The Proceedings In This Case

1. Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes to the Tribe's royalty interest in oil and gas produced on unallotted lands on the Tribe's reservation under leases issued pursuant to the 1938 Act (Pet. App. 131-149).[1] The Tribe is

[1] The taxes imposed are: (A) the Oil and Gas Severance Tax, Mont. Code Ann. §§15-36-101 *et seq.* (1983) (Pet. App. 195-205) (imposed at a rate of 5% or 6% of the gross value of oil and 2.65% of the gross value of gas produced, excluding royalty or other interests owned by the federal, state, county or municipal government (*id.* § 15-36-101(1)(a), (b) and (3)), to be distributed to the local government block grant fund, county governments, and the state general fund (*id.* § 15-36-112)); (B) the Oil and Gas Net Proceeds Tax, Mont. Code Ann. §§ 15-23-601 *et seq.* (1983) (Pet. App. 181-194) (imposed at a rate fixed by the county board of commissioners (*id.* § 15-23-607), but apparently excluding any royalty interests owned by the federal and state governments (*id.* §§ 15-23-605, 15-1-102), and paid to the County Treasurer (*id.* § 15-23-607)); (C) the Oil and Gas Conservation Tax, Mont. Code Ann. §§ 82-11-101 *et seq.* (1983) (Pet. App. 215-221) (imposed at a rate of

organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and is the beneficial owner of oil and gas that lies beneath its Reservation (Pet. App. 104-105). The state taxes assessed against the Tribe's royalty interest have been paid by the lessees, who then deduct the Tribe's share of the taxes from their royalty payments (*id.* at 3, 106-107, 142-145, 249-257; Pet. Br. 8-9).

The district court sustained the application of the state taxes to the Tribe's royalty interest and granted summary judgment in favor of the State (Pet. App. 103-130). The court acknowledged that the 1938 Act was intended to be a comprehensive leasing statute that "addressed nearly every subject concerning the leasing of Indian lands for mining purposes" (*id.* at 118) and that neither the text nor legislative history of the 1938 Act addressed the question of state taxation (*id.* at 119). However, the district court concluded that the state taxes are authorized by the 1924 Act (*id.* at 114). Viewing the question presented to be whether the taxing proviso to the 1924 Act had been "repealed" by the 1938 Act, the Court concluded that the silence in the text and legislative history of the 1938 Act was not sufficient to establish such a repeal (*id.* at 114-120, 125-129). The district court also relied upon what it believed was a longstanding administrative interpretation that such taxes are valid (*id.* at 120-125).

2. A panel of the court of appeals affirmed the judgment of the district court (Pet. App. 70-102), but on rehearing, the court, sitting en banc, reversed and remanded for further proceedings (*id.* at 1-69). The court of appeals rejected the Tribe's contention that the 1938 Act entirely repealed the consent to tax contained in the proviso to the 1924 Act, and the court therefore held that the 1924 Act's taxing authority remained in effect for leases issued under that earlier Act (*id.* at 33-36). However, the court concluded

.2% of market value (*id.* § 82-11-131) for the purpose of defraying the expenses of the State's oil and gas conservation board); and (D) the Resource Indemnity Trust Tax, Mont. Code. Ann. §§ 15-38-101 *et seq.* (1983) (Pet. App. 206-214) (imposed at a rate of ½% of the gross value of the production (*id.* § 15-38-104) to support a state trust fund that is established for environmental purposes (*id.* §§ 15-38-201 to 15-38-203)).

that the 1924 Act's taxing proviso was not incorporated by implication into the 1938 Act and that it therefore does not apply to leases issued pursuant to that Act (*id.* at 37-51).

The court explained that, as all parties conceded, Congress intended the 1938 Act to supersede the prior leasing statutes and that in enacting it, "Congress manifested an unmistakable intention to subject subsequent leases to the terms of the new statute rather than its predecessors" (Pet. App. 43). Against this background, the court could not infer that "Congress nonetheless intended that a portion of one of the predecessor statutes control a lease issued under the 1938 Act," especially in view of the absence of any indication of such an intent in the text, legislative history, or context of the 1938 Act (*id.* at 43-44). To do so, the court reasoned, would be inconsistent with this Court's holding in *Bryan* v. *Itasca County*, 426 U.S. 373, 393 (1976), that congressional consent to state taxation of Indian income from on-reservation activities must be clear (Pet. App. 44-45).

The court of appeals also did not believe that several informal administrative opinions by the Department of the Interior required a contrary conclusion. The court noted that a 1943 opinion by Solicitor Harper (58 Interior Dec. 535; Pet. App. 232-248) concerned leases issued pursuant to the 1891 and 1924 Acts, and therefore did not present the question of the application of the 1924 Act taxing authorization to leases under the 1938 Act (Pet. App. 4 n.1). The first occasion on which the Department considered that question was in a brief opinion written in 1956 by the Associate Solicitor (Pet. App. 262-266). The court found that the authority of that interpretation was undermined because it was adopted informally and without any analysis of whether Congress actually intended the taxing authority in the 1924 Act to apply to leases issued pursuant to the 1938 Act. In addition, the court noted that the Department formally repudiated that position in 1977 (84 Interior Dec. 905) "in a published and carefully reasoned opinion that analyzed both statutes and the Department's prior rulings" (Pet. App. 47) and that "[i]n 1979, the Department reexamined and adhered to its 1977 position" (*ibid.*, citing 86 Interior

Dec. 181 (1979)). "Under these circumstances," the court concluded, "confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage" (*ibid.*).

Finally, the court of appeals stressed that "the 1924 Act was an integral part of Congress's allotment program, under which all Indian land was intended to become subject to state taxation after the expiration of a brief trust period" (Pet. App. 48). In the court's view, the consent to tax in the 1924 Act was in harmony with the purposes of allotment. However, the court explained that the 1938 Act replaced prior mineral leasing statutes with a scheme calculated to advance the policies of the Indian Reorganization Act of fostering tribal sovereignty and economic growth, prohibiting further allotments, and extending indefinitely the trust and tax exempt status of previously allotted lands (Pet. App. 18-32, 48-49). The court "fail[ed] to see how interpreting the 1938 Act to incorporate implicitly the portion of the 1924 Act consenting to state taxation would advance [these] purposes of the 1938 Act" (*id.* at 49).

Judge Anderson dissented, joined by Judges Wallace and Kennedy (Pet. App. 52-69).

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Montana in this case seeks to tax the royalty interest of the Blackfeet Tribe in the production of oil and gas on the unallotted lands of the Tribe's Reservation. The imposition of a state tax on the income received by a Tribe from the resources held by the United States in trust for the Tribe constitutes a direct and substantial intrusion by the State into the realm of Indian affairs that ordinarily is reserved exclusively to the Tribe itself or to the Federal Government as its guardian. This is all the more so where, as here, the tax is imposed on the disposition of a depletable resource that represents a significant part of the value of the Reservation that the United States has set aside for the Tribe. A Tribe's income from the disposition of its resources through leasing activities is often used to maintain the tribal government and to furnish essential

governmental and other services to tribal members. See *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 138 (1980); cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137-141 (1982). The State's tax therefore also directly infringes upon the sovereignty of the Tribe in a way that ordinarily is unthinkable in the relations between sovereigns. Compare *Bryan* v. *Itasca County*, 426 U.S. at 388-389.

Against this background, only the clearest manifestation of congressional consent to state taxation would support the imposition of the taxes at issue here. *Bryan* v. *Itasca County*, 426 U.S. at 392-393. But in this case, as the State concedes, there is no indication whatever in the text or legislative history of the 1938 Act of an intent to permit state taxation of tribal income from oil and gas or other mineral leases issued under that Act. Far less is there the requisite clear and unambiguous expression of congressional consent to such taxation.

The State relies on a taxing proviso to an earlier statute—the 1924 amendment to the 1891 Act permitting the leasing of unallotted lands on treaty and statutory reservations—as authorization for the taxes. However, because the 1938 Act was comprehensive in its scope and superseded then-existing statutes with regard to future mineral leasing of unallotted lands, there is no basis for inferring from mere silence in 1938 that Congress intended implicitly to carry forward the prior taxing authority. To the contrary, when Congress wished to incorporate features of prior leasing schemes into the new regime, it expressly did so. But Congress omitted the taxing proviso.

Moreover, the provisions of the superseded statutes that authorized state taxation of tribal income under mineral leases were themselves departures from the general rule barring state taxation of restricted Indian interests, and they were enacted as part of the allotment policy, which anticipated the eventual sale to non-Indians of the unallotted reservation lands and the dissolution of tribal governments. By contrast, mineral production on *allotted* lands—those specifically designated for retention by the Indians—was never permitted, except in the case of the Five Civilized

Tribes and other Oklahoma Indians, where Congress specifically found that special circumstances warranted the imposition of state taxes. The allotment policy was ended in 1934 by the Indian Reorganization Act (IRA), which made clear that unallotted lands would remain with the Tribe and simultaneously sought to strengthen the Tribes as sovereign entities, not to dissolve them.

In light of the intervening reversal of national policy in the IRA, it is not in the least surprising that Congress chose not to include in the 1938 Act an authorization for the States to tax the Tribes' income under leases of unallotted lands issued pursuant to that Act; indeed, one of the principal purposes of the 1938 Act was to conform mineral leasing of unallotted reservation lands to the policies of the IRA.

A. STATE TAXATION OF INDIAN PROPERTY AND INCOME IS PERMISSIBLE ONLY WITH EXPRESS CONGRESSIONAL AUTHORIZATION, AND CONGRESS HAS RARELY GIVEN ITS CONSENT AND ORDINARILY HAS DONE SO ONLY WHERE SPECIAL FACTORS WARRANTED

The State does not appear to challenge the firmly established propositions that a State may tax reservation property or income of a Tribe or individual Indian only if it is clearly authorized by Congress to do so and that ambiguous language is not sufficient to deprive Indians of their historic immunity from such taxation. See, *e.g.*,, *Bryan* v. *Itasca County*, 426 U.S. at 392-393. Moreover, as this Court has stated with regard to the very issue presented in this case—whether Indian royalty income under oil and gas leases is subject to state taxation—"[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).

Although the State does not challenge the correctness of these principles, an appreciation of their firm foundation in the Constitution, laws, and experience of the Nation is nevertheless important to the proper resolution of this case. This is so because an exploration of the manner in which Congress and this Court have addressed the question of

state taxation of Indian property and income reveals that the taxing proviso to the 1924 Act upon which the State rests its entire argument in this case was itself such a striking aberration that it would be particularly inappropriate to infer that Congress intended the consent to state taxes in the proviso to be carried forward and applied to leases issued pursuant to the superseding leasing Act passed by Congress in 1938.

1. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy is embodied in the Constitution itself, which grants Congress alone the power "[t]o regulate Commerce * * * with the Indian Tribes," just as it confers on Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, Cl. 3. As this Court recognized in its earliest Indian cases, the Indian Commerce Clause was the product of a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under Article IX of the Articles of Confederation, which granted Congress "the sole and exclusive right and power * * * of regulating the trade and managing all affairs with the Indians," but exempted Indians who were "members of any of the States" and preserved "the legislative right of any State within its own limits." See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1832); *id.* at 590-592, 594 (McLean, J., concurring). See also *The Federalist* No. 42, at 284 (J. Madison) (J. Cooke ed. 1961); *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).[2] Against this background, the Court in *Worcester* v. *Georgia* held that "[t]he Cherokee nation * * * is a distinct community occupying

[2] So, too, the Constitution confers on the President, by and with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), including those with Indian nations (see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559-560), and declares such treaties to be "the supreme Law of the Land" (Art. VI, Cl. 2). At the same time, the Constitution prohibits the States from entering into any treaty (Art. I, § 10, Cl. 1).

its own territory, with boundaries accurately described, in which the laws of Georgia can have no force" (31 U.S. (6 Pet.) at 561). Only recently, the Court again recognized that the Indian Commerce Clause is "a shield to protect Indian tribes from state and local interference" (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153-154 (1982)).

To be sure, the rigid rule of *Worcester* v. *Georgia* has been modified over the years to permit the application of state law in some circumstances "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959). Thus, where a State seeks to regulate the conduct of non-Indians on a reservation, the Court has engaged in a more particularized inquiry into the nature of the state, federal, and tribal interests at stake, in order to determine whether the exercise of state authority is preempted by federal law or would impermissibly infringe "on the right of reservation Indians to make their own laws and be ruled by them" (*White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 145 (1980), quoting *Williams* v. *Lee*, 358 U.S. at 220). See also *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832, 837-838 (1982). But at the same time, the Court has stressed that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe* v. *Bracker* 448 U.S. at 144.

2. Although *Worcester* v. *Georgia* specifically concerned the extension of state criminal jurisdiction onto Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 169 (1973). Indeed exemption from taxation has long been regarded as one of the principal features of the distinct character of Indian tribes within their own territory. This principle too is reflected in the Constitution, which excludes "Indians not taxed" from the enumeration upon which the apportionment of Representatives and direct taxes is based. U.S. Const. Art. I, § 2, Cl. 3; *id.* Amend. XIV.

Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866), the Court held that the lands held by Indians in common as well as the lands held in severalty were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' * * * separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority." *Id.* at 755; see also *id.* at 758-759, 760-761. The Court likewise invalidated state taxes imposed on Indian reservation land in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866), terming the taxes and related provisions an "extraordinary" and "illegal" exercise of state power and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 766, 770, 771.

Consistent with these principles, the Enabling Act under which Montana was admitted to the Union required the State to disclaim any right and title to lands owned or held by an Indian Tribe, which "shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677. The Act further provided that no taxes could be imposed on lands belonging to the United States, and permits the State, absent congressional consent, to tax Indian land only if it is owned or held by an Indian "who has severed his tribal relations," and even then not to the extent the land was granted to the Indian under a law exempting the land from taxation. *Ibid.* Compare *McClananan* v. *Arizona State Tax Commission*, 411 U.S. 164, 175-176 (1973). These same principles also were implemented in the General Allotment Act of 1887, which provided for allotted lands to be retained in trust status for a specified period in order to ensure that they would be exempt from state taxation. See *United States* v. *Rickert*, 188 U.S. 432, 435-438 (1903); *United States* v. *Mitchell*, 445 U.S. 535, 543-544 (1980).

This Court has never waivered from the teachings of *The Kansas Indians* and *The New York Indians* as regards

state taxation of Indian lands, whether tribally owned or held in severalty, where the Tribe remains as a distinct entity. See, *e.g.*, *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 602-603 (1943); *McClanahan*, 411 U.S. at 169. Nor has Congress abandoned this general rule of exemption from state taxation, even where it has otherwise consented to the exercise of state jurisdiction. See, *e.g.*, 28 U.S.C. 1360(b) (discussed in *Bryan* v. *Itasca County*, 426 U.S. at 378, 390-392).

The foregoing principles of course not only bar state taxation of the land itself; they also bar state taxation of income realized by the Tribe or individual Indians from the land. For example, in *Thomas* v. *Gay*, 169 U.S. 264 (1898), which sustained the application of a tax by the Territory of Oklahoma to non-Indian owned cattle grazing on unallotted land under leases issued pursuant to the 1891 leasing act, the Court emphasized that the taxes were not imposed on the rents received by the Indians. 169 U.S. at 275. Moreover, the Court has repeatedly stressed in recent years that "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-476 (1976); *Bryan* v. *Itasca County*, 426 U.S. at 375-378, 392-393. See also *Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956).

3. Congress has only rarely given the requisite express consent to a State to tax income received by Indians from their land, and in general it has done so only on a particularized basis after weighing the circumstances involved. No such general consent has ever been given with regard to *allotted* lands that are held in trust or restricted status. For example, the statutes authorizing the leasing of allotted lands for oil and gas or other mining or for farming and

grazing purposes do not permit such taxation. Act of Mar. 3, 1909, ch. 263, 35 Stat. 783, 25 U.S.C. 396; Act of Mar. 3, 1921, ch. 119, § 1, 41 Stat. 1232, 25 U.S.C. 393. Nor does the statute permitting the sale of timber from allotted lands (Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857, 25 U.S.C. 406), and in *Squire* v. *Capoeman*, *supra*, the Court held that income from the sale of timber on a restricted allotment was not subject even to federal taxation. 351 U.S. at 7-9. The Court there explained that the Indian's "timber constitutes the major value of his allotted land" and that "[o]nce logged off, the land is of little value." The Court accordingly concluded that the allotment would not serve the congressional purpose of bringing the Indian to a state of competency and independence unless the entire proceeds of the sale of its timber were preserved for him. *Id.* at 10.[3]

There likewise is no general authorization for the taxation of income from *unallotted* lands. Although the 1924 Act permitted the taxation of tribal income from leasing of lands subject to the 1891 Act for mining purposes, income from leasing of such lands for grazing purposes under the 1891 Act was never made subject to state taxation. Cf. *Thomas* v. *Gay*, 169 U.S. at 272. See also 25 U.S.C. 402, 402a (permitting leasing of surplus land and unallotted irrigable land for farming, but with no authorization of state taxation). Similarly, the sale of timber from unallotted lands for the benefit of the Tribe—activity that involves exploitation of the principal resource of Indian Tribes other than minerals—is not made subject to state taxation. See Act of June 7, 1910, ch. 7, § 7, 36 Stat. 857, 25 U.S.C. 407. Indeed, in *White Mountain Apache Tribe* v. *Bracker*, *supra*, the Court held that the State of Arizona could not impose a motor carrier license tax or fuel use tax on a *non-Indian* company that harvested timber on unallotted land under this statute. The Court observed, inter alia, that such taxes "would threaten the overriding federal objective

[3] The Court distinguished *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935), on the ground that it permitted federal taxation of income derived from the investment of *surplus* income from land, or "reinvestment income," not the "trust" itself or "income derived directly therefrom." 351 U.S. at 9.

of guaranteeing Indians that they will 'receive * * * the benefit of whatever profit [the forest] is capable of yielding' " (448 U.S. at 149, quoting 25 C.F.R. 141.3(a)(3) (1979) (brackets added by the Court)) and would thereby undermine "the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs' " (448 U.S. at 149, quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 151). The Court noted in this regard that timber operations accounted for more than 90% of the Tribe's annual profits, which were virtually the only source of funding for the Tribe's governmental programs (*id.* at 138).[4]

Against this background, any congressional authorization of state taxation of a Tribe's or individual Indian's income from trust lands would constitute a significant departure from the established congressional policy of preserving Indian resources free from state interference. Such departures appear to have occurred almost exclusively with regard to income from mineral resources, and even there Congress typically acted on a case-by-case basis in light of special circumstances pertaining to the Oklahoma Indians, who were rich in mineral resources. The proviso to the 1924 Act, upon which the State relies, and its 1927 counterpart for Executive Order reservations, are the only exceptions to this cautious approach by Congress. And they were radical exceptions, because they were not dependent upon any assessment of the relative interests and circumstances of the Indians and the State. It is entirely understandable that Congress soon abandoned that broad authorization of state taxes.

The first statutory authorizations for the States to tax Indian income from trust property appear to have been enacted in 1921[5] with respect to oil and gas royalties received

[4] Cf. *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 12 ("when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose").

[5] The 1919 leasing Act permitted taxation only of the lessee's interest, not the lessor Tribe's income. See page 3, *supra*.

by the Osage Tribe[6] and income from restricted allotments granted to certain specified individual Quapaw Indians in Oklahoma.[7] Subsequent statutes were enacted in 1924 and 1928, respectively, permitting taxation of the production of oil and gas and other minerals on certain unallotted lands of the Kaw Reservation in Oklahoma[8] and the restricted allotted lands of members of the Five Civilized Tribes of Oklahoma.[9] But as this Court has observed, these four special statutes affecting only Oklahoma were "occasioned by the favorable economic position of the particular Indians." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 366-367 (1949). For example, the Court noted in *Oklahoma Tax Commission* v. *United States*, *supra*, that the oil and gas receipts of the Five Civilized Tribes from 1904 to 1937 were in excess of $100 million and those of the Osage Tribe for the same period were in excess of $261 million. 319 U.S. at 608-609 n.13.

Other factors were at work in Oklahoma as well. As a result of the policy of the Curtis Act,[10] the lands of the Five Civilized Tribes were divided among the members of the Tribes in severalty and the tribal governments effectively dissolved. See generally Felix S. Cohen, *Handbook of Federal Indian Law* 427-445 (1942). Thus, as this Court later observed, the principles underlying the Court's prior decisions concerning exemption of Indians from state tax and other laws "[did] not fit the situation of the Oklahoma Indians. Although there [were] remnants of the form of tribal sovereignty, those Indians [had] no effective tribal autonomy as in *Worcester* v. *Georgia*, *supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they [were] actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Oklahoma Tax Commission* v. *United States*, 319 U.S. at

[6] Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1250-1251.

[7] Act of Mar. 3, 1921, ch. 119, § 26, 41 Stat. 1248-1249.

[8] Act of May 27, 1924, ch. 199, 43 Stat. 176-177, 25 U.S.C. 401.

[9] Act of May 10, 1928, ch. 517, § 3, 45 Stat. 496.

[10] Act of June 28, 1898, ch. 517, 30 Stat. 495 *et seq.*

603.[11] In addition, the Court observed that the State of Oklahoma supplied the Indians with "schools, roads, courts, police protection and all the other benefits of an ordered society." *Id.* at 609.[12]

It also appears that in each instance Congress consented to the application of the Oklahoma tax as a condition to granting an extension of the period during which the property involved would remain in restricted status. For example, the Act of June 28, 1906, ch. 3572, § 3, 34 Stat. 543, which provided for allotment of lands of the Osage Tribe among its members, had reserved to the Tribe itself for 25 years the interest in the substantial oil, gas, coal and other mineral rights in those lands, in order that all members would share in them equally. See *McCurdy* v. *United States*, 246 U.S. 263, 265-266 (1918); S. Rep. 704, 66th Cong., 3d Sess. 1 (1921). The members of the Tribe in 1921 sought an extension of that 25-year period to enable the members to share equally in all remaining production. However, that extension would have resulted in the loss of substantial revenue to the State and Osage County, and Congress therefore provided for the imposition of the State's gross production tax on the taking of oil and gas. As this Court later observed, Congress was influenced by its knowledge that under Oklahoma law, one-third of the proceeds would be returned to Osage County and thereby directly benefit the Indians, and Congress specified that the taxes on Osage oil and gas must continue to be distributed in that manner. Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1251. See *Oklahoma* v. *Barnsdall Refineries, Inc.*, 296

[11] The Court in *McClanahan* explained the result in *Oklahoma Tax Commission* v. *United States* as involving a situation "where Indians have left the reservation and become assimilated into the general community." 411 U.S. at 171.

[12] Despite the force of these special factors, four Justices, in an opinion by Justice Murphy, dissented from the Court's holding permitting the application of Oklahoma's estate tax to restricted property of deceased Indians of the Five Civilized Tribes. 319 U.S. at 612-624. That dissenting opinion was cited with approval by the Court in *Bryan* v. *Itasca County*, 426 U.S. at 392.

U.S. 521, 524-525 (1936).[13] The legislative history also shows that the bill was favored by the Osage Indians themselves (S. Rep. 704, *supra*, at 2) and that its taxing provision was affirmatively endorsed by the Secretary of the Interior (*id.* at 5).

The Quapaw Indians also agreed to the imposition of state taxes on oil and gas production in 1921 as a condition to extending the 25-year period of restrictions under their original allotments.[14] And they consented again in 1937 to Congress's enactment of a more limited gross production tax on the mining of zinc and lead on their allotments,[15] in order to prevent any suggestion that other types of state taxes not anticipated in 1921 might be imposed by Oklahoma.[16]

The proviso to the 1924 Act upon which the State relies here, which permitted state taxation of the Tribe's royalty interest in leases of unallotted lands on all reservations subject to the 1891 Act, was expressly patterned after the narrow statutes pertaining to the Osage Tribe and Quapaw allottees, with the view that if other States adopted similar taxes, "the gross production tax should go to the upbuilding of the State." See 65 Cong. Rec. 6844 (1924) (remarks of Rep. Hastings). The sparse legislative history of the 1924 Act does not, however, suggest that Congress determined in connection with its passage that the varied circumstances of other Indian tribes in other States were similar to those of the Oklahoma Indians that had been thought to warrant creating an exception to the usual rule exempting tribal income from state taxes. Moreover, the doubtful wisdom of extrapolating from the experience of the Oklahoma

[13] In *Barnsdall*, the court held that because Congress consented only to a gross production tax similar to that permitted under Oklahoma law in 1921, the 1921 Act of Congress did not permit Oklahoma to impose a tax at a flat rate per barrel to defray the expenses of administering the State's oil and gas proration law. 296 U.S. at 525-526.

[14] See *Production Tax Upon Lead and Zinc on Quapaw Indian Lands in the State of Oklahoma: Hearing on H.R. 5559 Before the House Comm. on Indian Affairs*, 75th Cong., 1st Sess. 4, 7 (1937) (*Quapaw Hearing*).

[15] See Act of Apr. 17, 1937, ch. 109, 50 Stat. 68 *et seq.*

[16] See *Quapaw Hearing*, *supra* note 14.

Indians to Tribes elsewhere is suggested by the fact that although the Secretary of the Interior had affirmatively endorsed the taxing provisions of the Oklahoma bills,[17] he stated only that his Department would "offer no objection" to including a tax on the royalty interest of the Tribes affected by the 1924 Act. H.R. Rep. 386, 68th Cong., 1st Sess. 2 (1924); S. Rep. 546, 68th Cong., 1st Sess. 2 (1924). See Pet. App. 327, 331.

The casual manner in which Congress in 1924 enacted the broad authority for the States generally to tax tribal income from their trust resources was thus a marked departure, both in form and context, from the manner in which Congress approached the issue in the special cases of the Osage and Quapaw Indians and the subsequent Oklahoma statutes and from the caution Congress ordinarily has exhibited in this area. Needless to say, we should not lightly attribute to Congress an intent to accomplish the same result in the 1938 Act in an even more casual manner—that is, by mere silence. Between the time of Congress's enactment of the taxing proviso in 1924 and its enactment in 1938 of a new leasing statute that did not contain a taxing proviso, Congress thoroughly studied the plight of Indian Tribes elsewhere in the Nation, especially in connection with its consideration of the Indian Reorganization Act. Thus, by 1938, Congress fully appreciated that the circumstances of other Tribes were quite unlike those that had called for special exceptions permitting state taxation in Oklahoma. Instead of abolishing other Tribes and their reservations, as it had done in Oklahoma, Congress in the IRA sought to revitalize Tribes and fully restore their reservations to federally protected status.

[17] See H.R. Rep. 1193, 70th Cong., 1st Sess. 5 (1928) (tax pertaining to allottees of the Five Civilized Tribes is "not only fair and just to the State of Oklahoma, but to the Indians as well"); S. Rep. 982, 70th Cong., 1st Sess. 5 (1928) (same); S. Rep. 433, 68th Cong., 1st Sess. 3 (1924) (Secretary's letter proposing taxing provision applicable to the unallotted lands of the Kaw Tribe).

B. THE TEXT, LEGISLATIVE HISTORY, AND BACKGROUND OF THE 1938 ACT DO NOT SUGGEST THAT CONGRESS INTENDED TRIBAL ROYALTIES RECEIVED UNDER LEASES ISSUED PURSUANT TO THAT ACT TO BE SUBJECT TO STATE TAXATION

1. As we have said, and as the State concedes, there is nothing in the text or legislative history of the 1938 Act to suggest that Congress intended to permit States to tax the royalty income of Indian Tribes under leases that would be issued pursuant to that Act. Under the principles discussed in Point A (see pages 8-12, *supra*), that silence alone is a complete answer to the State's claim of a right to tax here, since only affirmative and clear congressional consent will suffice. Nor is there any reason to believe that Congress might have passed the 1938 Act on the mistaken premise that it was unnecessary to include in that Act an express provision consenting to the imposition of state taxes. To the contrary, the same Congress just a year earlier had enacted a law that explicitly confirmed in statutory form the establish rule that express consent is required.

In the Act of April 17, 1937, ch. 109, 50 Stat. 68 *et seq*, Congress modified the tax provisions of the 1921 Act applicable to the Quapaw allottees in Oklahoma (see pages 14-15, *supra*) in order to limit the consent to tax in a number of respects. The 1937 Quapaw statute then further stated (*ibid.* (emphasis added)):

> In accordance with the *uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the income therefrom free from State taxation of whatsoever nature, except as said immunity is expressly waived*, and in pursuance of said fixed policy, it is herein expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom * * *.

The legislative history shows that this language was intended to avoid any suggestion that restricted Indian land might be thought to be subject to state taxation unless Congress affirmatively granted an exemption. See *Quapaw Hearing*, *supra* note 14, at 7.

In light of this contemporaneous enactment expressing Congress's understanding of the applicable rule in statutory form, it is untenable to suppose that the same Congress—if it actually had intended a Tribe's royalty income under leases issued pursuant to the 1938 Act to be subject to state taxation—would have left that matter to a mere inference to be drawn from the terms of a prior statute (the proviso to the 1924 Act) that the 1938 Act otherwise superseded. Such an inference would be especially ironic and inappropriate here, because the 1921 Quapaw statute that Congress amended in 1937 to express its intent regarding the applicable rule was relied upon by Congress as one of the two precedents for the 1924 Act that the State invokes in this case. See page 17, *supra*. Moreover, even as regards the Quapaw Indians, Congress significantly restricted the scope of state taxing authority in 1937, by imposing a limit on the amount and type of tax and the minerals to which it applied. It therefore is difficult to believe that Congress at the same time intended to preserve after 1938 the far broader and open-ended grants of state taxing authority in the 1924 Act or its 1927 counterpart for Executive Order reservations.[18]

2. The suggestion that Congress intended to apply the taxing authority under prior law is in any event refuted by an examination of the text and structure of the 1938 Act itself. As the court of appeals held (Pet. App. 26-32, 43), and the State does not dispute, Congress intended that the 1938 Act would constitute a comprehensive scheme for leasing of unallotted lands and would supersede prior leasing statutes with regard to all leases issued after the effective date of the 1938 Act, except for the lands that are expressly ex-

[18] In 1927, Congress enacted a statute permitting the leasing of unallotted land on Executive Order reservations in accordance with the provisions of the 1924 Act. 25 U.S.C. 398a; see pages 2-3, *supra*. The express reference to the 1924 Act might well have been thought sufficient to apply the 1924 Act's taxing proviso to leases under the 1927 Act as well, but Congress nevertheless chose to include an express consent to state taxation under the 1927 Act. See 25 U.S.C. 398c. This further cautions against inferring a consent to state taxation where, as here, Congress has neither incorporated a taxing provision in the relevant statute nor referred to another statute that contains such a provision.

cluded under Section 6 of that Act, 25 U.S.C. 396f.[19] Thus, Section 1 prescribes what shall "hereafter" be permitted with regard to "unallotted lands within any Indian reservation" and other land owned by a Tribe, and Sections 1 and 2 together address all of the matters that were addressed by the substantive provisions of the 1924 Act that preceded its taxing proviso: the manner of bidding, the terms of leases, and the requirement of approval by the Tribe. Because the taxing authorization in the 1924 Act is merely a proviso to the substantive leasing provisions, the fact that the substantive features were entirely superseded with regard to leases issued under the 1938 Act strongly suggests that the taxing proviso appended to the substantive provisions likewise does not apply to such leases. See *United States* v. *McClure*, 305 U.S. 472, 477-478 (1939); *United States* v. *Marrow*, 266 U.S. 531, 535 (1925).[20]

This conclusion is all the more compelling because Section 1 of the 1938 Act paraphrases the 1924 Act in a number

[19] The excluded lands were "the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, [and] the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." As we have explained (see pages 14-17, *supra*), the mineral lands of the Osage Tribe were covered by a different statute that contained an express authorization to tax the Tribe's royalty interest under oil and gas leases, and that express congressional consent to state taxation therefore survived the 1938 Act. So, too, did the special taxing authorization pertaining to the Quapaw Indians and the Indians of the Five Civilized Tribes in Oklahoma, which applied to *allotted* lands; the 1938 Act, of course, applies only to unallotted lands. The lands of the Papago Reservation were separately subject to mining under the public mining laws (see IRA, § 3, 48 Stat. 984), and a special statute also governed the leasing of the Crow Reservation (Act of June 4, 1920, ch. 224, § 6, 41 Stat. 753, as amended, ch. 403, 44 Stat. 659). The exceptions in Section 6 therefore demonstrate that Congress knew how to provide for the application of provisions of preexisting leasing laws to leases issued after the effective date of the 1938 Act when it wished to do so.

[20] The fact that the proviso was codified with the rest of the 1924 Act in a single section (see 25 U.S.C. (1928 ed.) 398), not in a separate section, underscores that the taxing proviso was integrally related to the substantive features on the 1924 Act and does not state an independent congressional consent to tax that could apply to leases issued after 1938.

of respects[21] and was obviously patterned after it, with appropriate modifications to account for intended changes in scope and substance. In these circumstances, the fact that Congress did not at the same time incorporate the taxing proviso to the 1924 Act is strongly indicative of a deliberate decision by Congress not to permit state taxation of tribal royalty interests under the 1938 Act.

3. The conclusion that the taxing proviso to the 1924 Act does not apply to the leases involved here also is strongly reinforced by the purposes of the 1938 Act. Those purposes were to establish uniformity in the leasing of tribal lands, to "give the Indians the greatest return from their property," and to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." S. Rep. 985, 75th Cong., 1st Sess. 1-3 (1937); H.R. Rep. 1872, 75th Cong., 3d Sess. 1-3 (1938). See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 187 n.46 (Stevens, J., dissenting); Pet. App. 27-32.

a. The congressional goal of uniformity clearly would be disserved by a holding that the taxing provisions in prior statutes apply to leases under the 1938 Act. The prior taxing provisions varied considerably. Section 26 of the 1919 Act, for example, permitted state taxation only of the lessee's interests, not those of the Tribes, and that Act applied only in certain enumerated States, not to all reservations. 25 U.S.C. 399. See H.R. Rep. 1872, *supra*, at 1. The 1924 Act, which is applicable to reservations "bought and paid for," permits the State to tax the "production" of oil and gas or other minerals, including the Tribe's "royalty interests." 25 U.S.C. 398. By contrast, the 1927 Act, which applies to Executive Order reservations, permits taxation of the lessee's interest not only in production but also in improvements and other property. The 1927 Act also permits taxation not only of the Tribe's "royalties," as under the 1924 Act, but also "bonuses" and "rentals" received by the Tribe, which are not subject to state taxation under the 1924 Act.

[21] The 1924 Act provides that "unallotted lands on Indian reservations * * * may be leased * * * by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil and gas shall be found in paying quantities * * *."

Section 1 of the 1938 Act provides that "unallotted lands within any Indian reservation * * * may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

The manner in which taxes levied against the Tribe's interests may be paid also differs in the 1924 and 1927 Acts. Under the 1924 Act, the Secretary is directed to "cause" the taxes to be paid, which permits him to provide for the lessee to pay to the State the tax due on the Tribe's share and then deduct the amount of that tax from the royalties it pays to the Tribe. However, the 1927 Act directs the Secretary to cause the taxes assessed against the Tribe's bonuses, rentals and royalties "to be paid out of tribal funds in the Treasury." See Pet. App. 255-257. For the foregoing reasons, there would be considerable disuniformity if the varying taxing provisions in prior statutes were found to be applicable to leases issued pursuant to the 1938 Act.

b. Recognition of a right in the States to apply their taxes to 1938 Act leases also clearly would conflict with the congressional purpose to "give the Indians the greatest return from their property,' since any tax assessed against and deducted from the Tribe's royalty or other income obviously would reduce the net income realized by the Tribe. Compare *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 149. The effect could be felt not only with respect to the Tribe's receipt of royalties and other income as the beneficial owner of the land, but also in the curtailment of the Tribe's ability to exercise its inherent sovereign power to impose its own taxes on mining activities. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 137-141, 158-159 n.26. The effect of the state tax could be quite severe in certain circumstances, as in the application to Indian lands of Montana's 30% coal severance tax that was in issue in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981). If mining of a Tribe's coal is only marginally profitable, imposition of a state tax of that magnitude not only

could leave no margin for the Tribe to tax; it could prevent leasing or production altogether and thereby prevent the Tribe from receiving even its royalty income. See *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1113-1117 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982).

c. Finally, recognition of a right in the States to tax tribal income from mineral leases would be inconsistent with the purpose of the 1938 Act to "bring all mineral leasing matters into harmony with the Indian Reorganization Act." This is so in a variety of ways. Perhaps most significant is the fact that the statutes permitting state taxation of Indian income from mineral leasing were an integral aspect of the allotment policy. The allotment policy was repudiated by the Indian Reorganization Act, which accordingly removed the policy basis for permitting state taxation of the Tribe's royalty and other income from mineral leasing.

Under the General Allotment Act of 1887, the President was authorized to allot to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land, and this land was to be held in trust by the United States, exempt from state taxation, for a period of 25 years or such longer period as the President might provide. Act of Feb. 8, 1887, ch. 119, §§ 1, 5, 24 Stat. 388, 389, 25 U.S.C. 331, 348. See *United States* v. *Mitchell*, 445 U.S. 535, 540-545 (1980). The Secretary of the Interior was further authorized by Section 5 of the Act to negotiate for the purchase of lands not allotted, which would then be disposed of to settlers, with the proceeds deposited in the Treasury for the benefit of the Tribe. It was intended that allotment would result in the break-up of reservations, the dissolution of tribal relations, and the assimilation of the individual Indians into the non-Indian community following a period of preparation during the time that their allotments were held in trust. See, *e.g.*, *Draper* v. *United States*, 164 U.S. 240, 246 (1896); *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973); *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981); *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 3-5.

The proviso to Section 3 of the 1891 Act that permitted leasing for grazing or mining purposes of lands that are "not needed for farming or agricultural purposes, and are not desired for individual allotments," was part of an amendment to the General Allotment Act. Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. It thereby made unallotted lands available for temporary use by non-Indians, perhaps as a prelude to a more permanent disposition of the lands to non-Indians and the assimilation of the Indians into the community at large. See *Felix S. Cohen's Handbook of Federal Indian Law* 134-135 (1982 ed.). During the period that the allotment policy was in force, these lands that had not actually been allotted, and at the same time had not yet been disposed of to settlers or ceded to the United States, had something of an intermediate status: they were still retained for the benefit of the Tribe, but destined, it presumably was thought, to pass eventually into non-Indian hands and into the full taxing and other jurisdiction of the State. It thus was perhaps inevitable that the States and their non-Indian residents would grow impatient that this process did not proceed more rapidly. Moreover, if oil, gas, and other minerals were taken from the unallotted lands while they remained in tribal hands, the result would be to deprive the State of the opportunity to tax that extraction in the manner it might have done if the reservation had been dissolved more rapidly. These forces led to the 1924 Act permitting state taxation of the production of minerals on unallotted lands of reservations bought and paid for, so that the revenue could be obtained and used by the State. See pages 16-17, *supra*.

At the same time, however, although Congress permitted the leasing of allotted lands for mining purposes, it did not enact a comparable consent to state taxation of such mining while the allotment remained in trust status. See pages 12-13, *supra*. This, of course, was consistent with the allotment policy of preserving the full value of the parcels that were intended to be retained for the Indians' benefit over the longer term. However, in Oklahoma, where tribal relations had been largely dissolved and the allotment process completed—and where the economic position

of the Indians permitted and the needs of the state and local governments required—Congress consented to taxation of mineral production even on some allotted lands as well as tribal lands that had been held subject to restrictions on alienation. See pages 13-18, *supra*.

"The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act" (*Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 479, quoting *Mattz* v. *Arnett*, 412 U.S. at 496 n.18a). In the IRA, Congress prohibited any further allotment of reservation lands (Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984, 25 U.S.C. 461), extended the existing period of trust or restrictions on alienation of any Indian lands until Congress otherwise directed (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)). The effect, of course, was to eliminate any expectation that unallotted reservation lands were destined to pass into non-Indian hands and state jurisdiction and thereby to remove the justification for the state to tax mineral production on the unallotted lands of the reservation. Indeed, the congressional intent to exempt lands from taxation is reflected in Section 5 of the IRA, 48 Stat. 985, 25 U.S.C. 465, which permits the Secretary to acquire land in the name of the United States in trust for the tribe or individual Indian and provides that such lands "shall be exempt from State and local taxation."

In light of this "'intervening' legislative enactment[]" (*Bryan* v. *Itasca County*, 426 U.S. at 386, quoting *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 479) repudiating the allotment policy and restoring full and enduring tribal interest in and control over unallotted reservation lands and resources, it was to be expected that when Congress revised the mineral leasing laws in 1938 to bring them into harmony with the IRA, it would decline to renew the prior authorization for the States to tax mineral production under leases of those unallotted lands. The effect was to restore unallotted lands to an equal footing with allotted lands insofar as state taxation of on-reservation Indian land and income was concerned, since mining under leases on allotted land had never been subject to state taxation.

A holding that the taxing proviso to the 1924 Act applied to the 1938 Act leases also would be inconsistent with the purposes of the IRA "to rehabilitate the Indian's economic life," and "'to give the Indians the control of their own affairs and of their own property.'" *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152-153, quoting H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (remarks of Sen. Wheeler). The income that a Tribe realizes through royalties from mineral leasing of unallotted lands and through the imposition of tribal taxes on mining is often used to maintain the tribal government and to furnish needed services to tribal members. This Court in *Merrion* viewed the Tribe's power to tax as an "essential instrument of self-government and territorial management" (455 U.S. at 139; see generally *id.* at 137-141). See also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980). The ability of a Tribe to obtain the needed financing could be seriously impeded if the States were permitted to siphon off revenues "derived from value generated on the reservation by activities involving the Tribes" (*Colville*, 447 U.S. at 156-157) and to devote those revenues to state purposes that do not affect the Tribes. See note 1, *supra*. When Congress permitted state taxation of mineral extraction on Indian reservation land in 1924 in order to help in the "upbuilding of the State" (65 Cong. Rec. 6844 (1924)), it did so based on the precedents in Oklahoma, where tribal governments were dissolved, reservations were broken up, and the state or local government provided a full range of governmental services to the Indians. Any expectation that Indians and reservations elsewhere would meet a similar fate and that the States would assume full responsibility for the Indians was dispelled by the IRA.

That Congress distinguished the Oklahoma Indians is apparent from the IRA itself, which expressly excluded a number of Oklahoma Tribes and their members from the provisions of the IRA that extended the restricted period of allotments, permitted the Secretary to establish new reservations, and authorized Tribes to organize by adopting constitutions and obtaining a charter for tribal corpora-

tions. § 13, 25 U.S.C. 473. See §§ 2, 7, 16, 17, 25 U.S.C. 462, 467, 476, 477. In 1936, Congress did enact a more limited IRA-type statute for Oklahoma—the Oklahoma Indian Welfare Act (Act of June 26, 1936, ch. 831, 49 Stat. 1967, 25 U.S.C. 501 *et seq.*)—which permitted Oklahoma tribes to organize and conferred other benefits. But significantly, unlike the IRA or the 1938 leasing Act that builds on the IRA, the Oklahoma statute expressly contemplates the continued application of Oklahoma taxes on the production of oil, gas and other minerals. Section 1 of the Oklahoma statute permits the Secretary to acquire lands for Indians and hold them in trust for the Indians concerned and provides that such lands shall be "free from any and all taxes." 25 U.S.C. 501. To this extent, it direct parallels Section 5 of the IRA. But unlike the latter provision, Section 1 of the Oklahoma statute contains an exception permitting the State of Oklahoma to levy and collect a gross-production tax on all oil and gas produced from such acquired lands. *Ibid.* See also 25 U.S.C. 510. This is yet another indication that Congress did not contemplate that States other than Oklahoma would tax oil and gas production on unallotted tribal lands.[22]

In sum, even viewing the question of statutory construction in isolation, the court of appeals' conclusion that the 1924 taxing proviso does not apply to leases issued pursuant to the 1938 Act "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982). When the 1938 Act is read against the background of this Court's decisions and the pattern of congressional action regarding state taxation of on-reservation Indian land and income derived from that land, the court of appeals' conclusion is compelling.[23]

[22] The hearings in 1938 that addressed the loss of revenues to the States as a result of tax exemptions for Indian lands and mineral production on those lands, discussed by the State (Pet. Br. 36-37, 66), also focused exclusively on Oklahoma. See *Loss of Revenue—Tax Exempt Indian Lands: A Hearing on S. Res. 168 Before the Senate Comm. on Indian Affairs*, 75th Cong., 3d Sess. (1938). Those hearings in no way suggest that Congress intended when it enacted the 1938 Act to permit state taxation generally. If anything, these contemporaneous hearings would have brought home to Congress or the responsible committee the need to provide for such taxes in the 1938 Act if it had wished to allow such taxes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1984

[23] As explained by the court of appeals (Pet. App. 45-47) and summarized above (see page 5, *supra*), there was no contemporaneous administrative interpretation of the 1938 Act that permitted state taxation of production under leases issued pursuant to the 1938 Act, and the administrative interpretation in several informal opinions in the mid-1950's and 1966 were properly discounted, especially in light of the Department's contrary view after formally reassessing the matter in 1977.

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(9)

No. 83-2161

In The

Supreme Court of the United States

October Term, 1984

STATE OF MONTANA, et al.,

Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Response to Petitioner's Statement

Montana's brief makes two assertions that are misleading and may imply allegations of fact that are incorrect and unsupported by the record. Both relate to a point of confusion that has to some extent permeated this case from its inception. The Blackfeet Tribe has not challenged Montana's taxation of non-Indian oil and gas producers operating leases on tribal lands. The challenge is solely to taxes on the tribal royalty share of production, typically a one-eighth share. The State's Statement of the Case alleges, "Until 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases." Mont. Br. 9. The claim is repeated in the State's argument. *Id.* at 26. If the State merely means that it has taxed non-Indian oil and gas producers operating on Blackfeet lands, the claim may be true (although we doubt that Montana is so efficient as to collect taxes on "all" production). If the State means to imply that it taxed "all" tribal royalties before 1977, the statement is incorrect and is not supported by the record, as discussed below.

The State's second allegation says that the Interior Department "assisted the State in collecting its taxes on all leases for a period of more than 40 years." Mont. Br. 19. This assertion is repeated at Mont. Br. 28 and 30. Again, if this means taxes on the non-Indian producer's share, it might be true but is not what is at issue in this case. But if this is a clever way to say that Interior consistently assisted in collecting taxes on the tribal royalty share from post-1938 leases for 40 years, it is not correct and is not supported by the record.

It is notable that Montana cites nothing in the record to support these assertions. What the trial record has is a 1977 Bureau of Indian Affairs Special report showing that taxes were deducted from tribal royalties by some (but not all) lessees between the years 1955 and the date of the report. R. vol. II doc. no. 52 (exh. C).

The trial record also has affidavits of state officials that conflict with the claims Montana is making to this Court. There is a separate affidavit for each Montana tax at issue with an attached form used to report the tax. R. vol. II doc. no. 65 (exh. 2-6 and attached forms). Several of these affidavits assert that it is impossible from State records to determine whether *any* tax has been paid on tribal royalties. *Id.* (exh. 2 ¶10, 3 ¶10, 4 ¶17, 5 ¶18, 6 ¶7-15). Two of them state specific instances when taxes were not paid on tribal royalties. *Id.* (exh. 4 ¶16, 5 ¶16). Only one of them, respecting a minor tax, recites knowledge of instances when taxes were paid on tribal royalties. *Id.* (exh. 5 ¶17).

In the Court of Appeals, the Tribe added to the record copies of several formal and informal Interior Department opinions that are reprinted in the State's Appendix to its Petition, pages 232-321. As we discuss fully in our argument (at 23-24), the earliest mention in any of these opinions of the 1938 act or of leases made under it is in an informal and unpublished opinion of the Associate Solicitor for Indian Affairs made in 1956. The record is silent prior to that date. The State can claim some indirect, low level administrative support for its position for the period from 1956 to 1977. But the record plainly does not support the State's shotgun claim of a consistent administrative practice for 40 years. In fact, an earlier

opinion made in 1954, addressing taxes under pre-1983 leases, seems to say that taxes had not been regularly paid for several years. Pet. App. 254.

In sum, the record is silent on tax collections or administrative practice respecting 1938 act leases prior to 1955 or 1956, long after the 1938 act was passed. From 1955 to 1977, the record shows some royalty taxes paid and some low-level administrative opinion favoring the State. In 1977, Interior made its first careful review of the issue presented here and ruled against the State. 84 Interior Dec. 905 (1977). It has consistently followed this ruling, as shown by the brief of the United States in this Court.

Facts

The Blackfeet Tribe of Indians resides on an isolated reservation in northwestern Montana. The reservation is bordered on the west by Glacier National Park and on the north by the Canadian border.[1] The reservation economy is severely limited by its isolated location and available resources. Since 1932, the Blackfeet Tribe has been developing its oil and gas resources as one of the few means available to achieve economic independence.

Montana levies four separate taxes on the Blackfeet Tribe's royalty interests from oil and gas production on

[1]The Blackfeet Reservation was originally reserved to the Tribe by Treaty of October 17, 1855, 11 Stat. 657. It was subsequently reduced to its present size by a series of executive orders and cessions. *See* British-American Oil Producing Co. v. Board of Equalization of the State of Montana, 299 U.S. 159, 162-63 (1936); 84 Int. Dec. 905,912 (1977) (Pet. App. 267, 292-295).

the Reservation.[2] This case was initiated by the Blackfeet Tribe in 1978 because it believed that Montana was invalidly taxing tribal property and thereby inhibiting tribal economic independence.[3] At the time, the Tribe was the lessor in 125 oil and gas leases, twelve made prior to 1938 and the remainder made after 1938.

The pre-1938 leases were made under authority of the Act of February 28, 1891,[4] as amended by the Act of May 29, 1924.[5] The 1891 act authorized the leasing of lands "occupied by Indians who have bought and paid for the same." Prior to 1938 it was the primary authority for leasing unallotted lands on treaty reservations for oil and

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[2]The four taxes are:

1. Oil and Gas Severance Tax, 15-36-101 et seq. M.C.A. (1983) (Pet. App. 195);
2. Oil and Gas Net Proceeds Tax, 15-23-601 et seq. M.C.A. (1983), formerly 84-7201 et seq., R.C.M. (1947) (Pet. App. 181);
3. Oil and Gas Conservation Tax, 82-11-131, M.C.A. (1983), formerly 60-145, R.C.M. (1947) (Pet. App. 215);
4. Resources Indemnity Trust Tax, 15-38-104 et seq. M.C.A. (1983), formerly 84-7006, R.C.M. (1947) (Pet. App. 206).

The tribe also challenged in its amended complaint the Producer's License Tax, 84-2202 R.C.M. (1947) (Pet. App. 222). This section was repealed and replaced by the Oil and Gas Severance Tax. It is principally relevant to the Tribe's claim for a refund of past tax payments, which was not addressed in the courts below.

[3]The combined taxes take about 18% of gross oil production in Glacier County and about 17% in Pondera County, varying with the local tax rate. *See* Montana Taxation—1984 (Mont. Tax Found.). By contrast, the Tribe's royalty is usually 12.5%.

[4]26 Stat. 795, codified at 25 U.S.C. 397 (Pet. App. 150-151).

[5]43 Stat. 244, codified at 25 U.S.C. 398 (Pet. App. 152-154).

gas purposes. The 1924 act amended the 1891 act to allow the extension of the term of oil and gas leases to "as long as oil and gas be found in paying quantities," and to authorize state taxation of production "on such lands" in the same manner as production on unrestricted lands.

In 1938, Congress enacted a comprehensive Indian mineral leasing statute designed to achieve uniformity in the leasing of Indian lands for mining purposes, harmonize with the Indian Reorganization Act, and increase the economic return to the Indians.[6] The majority of the leases in question were made under this statute.

Proceedings Below

The district court held that the 1924 act authorized the state taxes, in an opinion dated January 6, 1981, which granted summary judgment to petitioners. 507 F.Supp. 446 (D. Mont. 1981), Pet. App. 103.[7] On appeal, the Ninth Circuit Court of Appeals affirmed the district court. 729 F.2d 1185 (9th Cir. 1982), Pet. App. 70. The Tribe petitioned for rehearing *en banc*, which was granted. 709 F.2d 521 (9th Cir. 1982).

The *en banc* decision affirmed the district court's holding that the 1938 act did not repeal the 1924 act tax authorization for leases made prior to 1938. But for

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[6]Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. 396a-396g (Pet. App. 175-180).

[7]Montana also defended its taxes on the ground that the sole legal incidence of the taxes is on the non-Indian producers so that the Tribe is not taxed. The district court did not rule on this issue.

leases after 1938, the court held that the 1924 act tax authorization does not apply. 729 F.2d 1192 (9th Cir. 1984), Pet. App. 1. The court remanded the case to the district court to determine the legal incidence of the tax. If the incidence of the tax is found to be on the producer, the Ninth Circuit further directed the district court to decide whether Montana's taxes are preempted under the standards of *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982). The State then obtained review by this Court.

SUMMARY OF ARGUMENT

Since 1938, Blackfeet oil and gas leases have been executed under the 1938 Indian Mineral Leasing Act. No provision of the 1938 act expressly or implicitly authorizes state taxation of these leases.

The 1924 act tax consent is a provisio to an amendment to the 1891 leasing act. By its plain terms, the consent applies only to leases made under the 1891 act as amended. Therefore, no issue of repeal of the 1924 tax consent is raised. Even if repeal is considered, it is clear from the 1938 act and its legislative history that the 1938 act was intended as a prospective replacement for prior leasing laws. Nothing in the 1938 act incorporates preexisting statutory provisions, even though prior laws continue to govern existing leases.

State taxation of tribal royalties is inconsistent with the three major purposes of the 1938 act. The act was

intended to bring leasing into harmony with the policies of the Indian Reorganization Act (IRA). Exemption of Indian lands from state taxation was an express policy of the IRA, which also established the means to give tribes greater control over reservation resource development. Both the IRA and the 1938 act were also meant to promote economic independence for tribes by insuring the greatest return from tribal property. Lastly, the 1938 act was intended to bring uniformity to the area of Indian mineral leasing. Application of the 1924 tax consent would thwart each of these purposes of the 1938 act.

In a decision published in 1977, the Department of the Interior concluded that 1938 act leases are not subject to the 1924 tax consent. This is the only administrative decision to address the specific issue before the Court, and it directly supports the Tribe's position. The State's claims that royalty taxes were consistently paid and supported by the Interior Department prior to 1977 are incorrect and are not supported by the record.

State taxation of Indian poperty is a major departure from normal policies against taxing the property of tribes on self-governing reservations. The 1924 tax consent, made at a time when federal policy contemplated that reservations would cease to exist, should not be extended by doubtful and ambiguous construction to the 1938 act, passed after Congress had reaffirmed the policy of reservation self-government.

ARGUMENT

The 1924 Tax Consent Proviso Does Not Apply to Leases Made Under the 1938 Mineral Leasing Act

A. The Wording of the Proviso Plainly Applies Only to Lands Leased Under the 1891 Leasing Act, as Amended in 1924.

The tax proviso found in the 1924 amendment to the 1891 act consents to state taxation of production only "on such lands." 25 U.S.C. 398. "Such lands" in the proviso refers to the main part of the 1924 statute, the subject of which is "unallotted land on Indian reservations . . . subject to lease for mining purposes . . . under . . . the Act of February 28, 1891 . . . . " Thus "on such lands" refers to lands that are leased under the 1891 act. These are the only lands mentioned at all in the statute, and the only lands to which the tax consent can apply. Generally, a proviso like the tax consent in the 1924 act, refers only to the provision to which it is attached; it is not an independent law. *United States v. McClure,* 305 U.S. 472, 477-78 (1939); *United States v. Morrow,* 266 U.S. 531, 535 (1924).

The plain meaning of the 1924 tax consent presents a straight-forward issue of statutory construction. It does not raise any question of repeal. This construction leaves the 1891/1924 act in force for leases that were made under it. There is no occasion to resort to the rules governing repeals by implication. As the Court said in *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982):

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The literal meaning of the statute is supported by several factors. First, the 1924 act is an amendment to the 1891 act. It includes new terms and conditions under which lands can be leased under the 1891 act. It is not a separate leasing authority, and it does not refer to any other acts under which lands could be leased.

Second, Congress in 1927 enacted a separate tax consent provision in connection with the leasing of Executive Order reservation lands for oil and gas mining purposes.[8] Section 3 of the 1927 act, 25 U.S.C. 398c, authorized state taxation of oil and gas production including tribal royalties "in the same manner as such taxes are otherwise levied and collected." If the 1924 act tax consent applied to lands other than those leased under the 1891/1924 act, the separate tax consent in the 1927 act would have been redundant.

Third, the plain meaning of the statute is also supported by the fact that the 1938 act is a separate and independent source of authority for the leasing of Indian lands for mining purposes. It applies to leases entered

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[8] Act of March 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. 398a-398e.

into "hereafter," that is, after May 11, 1938.[9] In fact, all Indian leases made after 1938 (until 1982)[10], specifically have been executed only under the 1938 act, and federal regulations governing oil and gas leasing since 1938 have recited only the 1938 act as authority for the regulations. *See* Part C *infra*. The 1938 act does not specifically carry forward or incorporate any prior laws, nor has it been interpreted administratively as doing so.

Montana's argument that the 1924 tax consent applies to leases made after 1938 depends on the idea that the tax consent is ambulatory, or that the 1938 act implicitly incorporates the tax consent despite the lack of any language to that effect. However, the plain meaning of the 1924 tax consent, together with the autonomous nature of the 1938 act, support just the opposite interpretation—that the 1924 tax consent applies only to leases made under the 1891 act.

B. State Taxation of Tribal Royalties Is Inconsistent with the History and Purposes of the 1938 Act.

States are prohibited from taxing tribal property unless Congress expressly consents. *Bryan v. Itasca County*,

[9]Montana does not dispute that the 1938 act is a separate leasing authority, but argues that the 1924 tax consent does not conflict or is not inconsistent with this separate leasing statute and therefore applies even to 1938 act leases. This reasoning twists the rule against repeals by implication into a "rule" that a priviso in one law is presumed to apply to another, separate law unless it is wholly inconsistent with it. No such "rule" has ever been applied by any court.

[10]In 1982 Congress passed another, broader Indian Mineral Leasing Act, 96 Stat. 1938, codified at 25 U.S.C. 2101-2108. Like the 1938 act, the 1982 act does not consent to state taxation. Nevertheless, in its petition for certiorari, the State seemed to claim the right to tax tribal leases under the 1982 act. Pet. 41.

426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). There is nothing in the 1938 act or its legislative history that mentions taxation or rises to the level of express Congressional consent to taxation. Indeed, the very purposes of the 1938 act would be undercut by the imposition of state taxes on tribal royalties.

There were three major purposes of the 1938 act. The first was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938). The second purpose was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act [Act of June 18, 1934, 25 U.S.C. 461 et seq.]". S. Rep. No. 985 at 3; H.R. Rep. No. 1872 at 3. The third purpose was to insure that the Indians receive the "greatest return from their property." S. Rep. No. 985 at 2; H.R. Rep. No. 1872 at 2. State taxation of tribal royalties conflicts with each of these purposes.

Prior to the passage of the 1938 act, mineral leasing on tribal lands was authorized by a number of different statutes, or in some situations by none at all. Separate statutes authorized leasing of tribal lands on treaty and statutory reservations that had been "bought and paid for" (1891/1924 act), and on Executive Order reservation lands.[11] A 1919 Act of Congress authorized leases of un-

[11]Act of Mar. 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. 398a-398e.

allotted lands on Indian reservations in nine states for mining except for oil and gas.[12] Tribal lands of certain tribes were subject to special leasing statutes.[13] Tribal lands set aside by statute that had not been "bought and paid for" were not covered by any of the leasing authorities except for those within the nine named states in the 1919 act, which omitted oil and gas.[14] The status of off-reservation tribal lands was uncertain. As a result, the entire area of mineral leasing of tribal land was confusing, overlapping, and sometimes inadequate. The need for uniformity was clear.[15] The 1938 act authorizes leasing for mining purposes on all categories of tribal land except for those expressly excepted in Section 6 of the act. The 1938 act therefore achieved substantial uniformity for most tribal lands, including some not covered by any prior leasing authority.

State taxation also conflicts with the second major purpose of the 1938 act—to bring leasing into harmony with the Indian Reorganization Act. This purpose appears on the face of the 1938 statute in the proviso to Section 2 and in its legislative history. *See* S. Rep. No. 985, *supra*,

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[12]Act of June 30, 1919, 41 Stat. 31, codified at 25 U.S.C. 399.

[13]*See e.g.* discussion of the complex Osage statutes in F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), Ch. 14, Sec. B3b.

[14]For an important example of such lands, see *infra* at 14 (discussion of 25 U.S.C. 465).

[15]The 1938 act was prospective only, causing lack of uniformity between leases made before and after the act. This was presumably thought prudent to avoid difficult problems of retroactive application.

at 3; H.R. Rep. No. 1872, *supra*, at 3.[16] These specific references to the IRA in the act and its legislative history require a close examination of the purposes and policies of the IRA with which the 1938 act was intended to harmonize.[17]

The Indian Reorganization Act signalled a significant and substantial change in federal Indian policy. It marked the end of the assimilationist era and began a new era of tribal revitalization in terms of tribal government and economic development. It provided for the reorganization of tribes as constitutional governments and business corporations, and it repudiated the policy of allotment of Indian lands, which had been responsible for the loss of so much land. *See Fisher v. District Court*, 424 U.S. 382, 387 (1976) (the IRA was specifically "intended to encourage Indian tribes to revitalize their governments"); *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act [the IRA] was to establish machinery whereby Indian tribes would be able to assume

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[16]There is an additional connection between the 1938 act and the IRA. The IRA was sponsored by Senator Wheeler and Representative Howard; it is sometimes called the Wheeler-Howard Act. The same Congressmen introduced the first bills that eventually led to the 1938 act. S. 3565, 73d Cong., 2d Sess. (1934); H.R. 9427, 73d Cong., 2d Sess. (1934). *See* 78 Cong. Rec. 7876, 8265 (1934).

[17]Petitioners argue that the IRA should not be used to assist in interpreting the 1938 act, citing Rice v. Rehner, 103 S.Ct. 3291 (1983). Mont. Br. 47-48. This ignores the specific language of the act and the legislative history, and the many cases in which this Court has looked to the IRA and its policies in striking down state regulation of Indian activities within reservations. *See* New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378, 2386 n.17 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134-35 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n.10 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479 (1976).

a greater degree of self-government, both politically and economically").

State tax exemption was an express policy of the IRA. This is plain from § 5 of the Act, 25 U.S.C. 465, which authorizes land within or without existing reservations to be taken in trust for tribes or individual Indians. The section specifies that such land "shall be exempt from State and local taxation." *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-59 (1973). Mineral taxation is not excepted from the tax exemption. (Contrast 25 U.S.C. 501, the comparable law for Oklahoma, which expressly allows certain mineral taxes.) Thus, application of the 1924 act to 1938 leases plainly conflicts with an explicit policy of the IRA.

Lands taken in trust for a tribe under § 5 of the IRA are leaseable under the 1938 act but not under the 1891 act unless they have been "bought and paid for." Most acquisitions under § 5 have been granted to tribes by the U.S. Therefore, this is a major category of tribal land for which there was no leasing authority before 1938.

The governmental, economic, and land preservation purposes of the IRA are all directed toward increased tribal autonomy over internal affairs, the protection and development of tribal lands and natural resources, and the furtherance of economic independence. Sections 16 and 17 of the IRA provide a mechanism for tribes to reorganize or revitalize their governments. Among other things, these provisions authorize tribes to exercise greater control over their land and resources by allowing them "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe" and by allowing tribal corporations "the power to purchase . . . or otherwise, own, hold, manage, operate and dispose of real property . . . ."[18] Rather than creating harmony with the IRA, state taxation would make it even more difficult for tribes to control development on their reservations. It would be inconsistent for the 1938 act as a statute designed to give tribes full IRA authority in the area of leasing to, at the same time, diminish that authority by authorizing state jurisdiction to tax tribal property.

The importance of IRA policies in the construction of later statutes is apparent in the Court's decision in *Moe v. Confederated Salish & Kootenai Tribes, supra.* Montana attempted to impose certain taxes on Indians residing on former allotments that had been granted to the Indians in fee under a 1906 amendment to section 6 of the General Allotment Act, 25 U.S.C. 349, which specifically applied State law to allottees. 425 U.S. at 477-79. The Court held the taxes invalid based in part upon the policies of the IRA. Here both the 1938 act and its legislative history specifically refer to the IRA. Thus reference to IRA policies and purposes is not only invited but required.[19]

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[18]Sections 16 and 17 are the heart of the IRA. They are the means established by Congress for achieving greater tribal control and protection over reservation resources and economic independence. Thus sections 16 and 17 involve far more than merely requiring tribal consent to the leasing of land as Montana argues. In any case, as Montana points out, Mont. Br. 52, tribal consent was already part of the 1891/1924 act. Thus no greater harmony with the IRA would be achieved by the 1938 act if it merely added a tribal consent requirement.

[19]Petitioners misstate the importance of the IRA in interpreting the 1938 act. The IRA did not "do away with" the

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Lastly, state taxation would conflict with the purposes of both the 1938 act and the IRA to further economic independence of tribes. Imposition of a tax on the development of already scarce resources would obviously diminish the return to tribes and make the possibility of achieving economic independence even more remote. As *amici* Gulf Companies et al. point out, imposition of the full burden of state taxes on reservation mineral development, whether the burden formally falls on the tribe, the producer or both, severely impacts that development. This is most especially true in Montana, which has very high rates of mineral taxation. *See* fn 3 *supra* (17-18% of gross proceeds for oil); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 613 (1981) (30% of gross proceeds for coal). Taxes this high severely retard development.

The failure of Congress to say anything about state taxation in the 1938 act and the lack of any reference in the legislative history means that express Congressional consent to state taxation is lacking. There are several indications that taxation was intentionally absent from the statute. The tax consent provision in the 1924 act was a particularly prominent part of the statute, both in terms of the words of the statute and the importance of the issue. It was a clear departure from the norm—one of the few instances in which Congress has consented to state taxation of Indian property. It was such a unique provision that it is unlikely that Congress would not have

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1924 act tax consent. Mont. Br. 51. But in determining whether the 1938 act intended implicitly to incorporate the tax consent, it is appropriate to look to the purposes and policies of the IRA, because the 1938 act is specifically intended to harmonize with those purposes and policies.

considered it in the process of enacting a comprehensive Indian mineral leasing statute. It is also such an important issue that it is unlikely that Congress would have left to chance the taxation of leases under the 1938 act. If it intended the leases to be taxed, it would and should have said so.[20]

Congress was clearly aware of the importance of the issue. The same Congress that passed the 1938 act held hearings on the loss of revenue from tax exempt Indian allotments in Oklahoma—hearings in which taxation of oil and gas production played an important part. *Loss of Revenue—Tax Exempt Indian Lands*, Hearings on S. Res. 168 Before the Senate Committee on Indian Affairs, 75th Cong., 3d Sess. (May 6, 1938). Montana argues that these hearings support its position in this Court. Mont. Br. 36-37, 66. The opposite is true. The hearings dealt with Indian trust allotments in Oklahoma, not located on self-governing reservations, but also not taxable under the 1924 act or any other law. As the Court has recognized, many Indians in Oklahoma "have left the reservation and become assimilated into the general community." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973). The 1938 hearings detailed the extent to which Indian allottees in that state were interspersed among the general population and were receiving the same level of state services as other persons. It is absurd to think that a Con-

[20]Montana cites several acts which contain specific tax consents. Mont. Br. 35. When Congress wanted to authorize taxation it was careful to include consent in the statute. Congress therefore would be expected to exercise at least as much care, if not more, in addressing the issue in such a comprehensive and wide-sweeping law as the 1938 act.

gress that was so carefully considering whether Oklahoma could show the need to tax mineral production from Indian allotments would authorize taxation of land on self-governing reservations without a word in the statute or legislative history.

The same contrast is shown by another statute invoked by Montana. In the Oklahoma Indian Welfare Act passed in 1936, Congress expressly consented to state taxation of mineral production on lands taken in trust under the Act. *See* 25 U.S.C. 501, cited at Mont. Br. 66. By contrast, the comparable section of the Indian Reorganization Act—applicable to the Blackfeet Reservation—exempts lands taken in trust under it from *all* state taxation. 25 U.S.C. 465.

C. The 1938 Act Was Intended as a Prospective Replacement for Other Acts Authorizing Mineral Leases on Indian Lands.

The plain meaning of the 1938 act, *see* Part A, should make the State's alleged issue of implied repeal and any reference to rules governing implied repeals immaterial. But even if these rules are considered, in context the 1938 act was a prospective replacement for prior leasing laws, not a piecemeal amendment of them. It was a comprehensive statute intended to replace almost all other acts authorizing mineral leases on tribal lands from the date of the act forward. The 1938 act covers the whole subject of tribal mineral leasing except for the tribes expressly excepted. Reference to prior leasing statutes, including the 1891/1924 act, is therefore entirely unnecessary.[21] This

[21]The prior statutes were replaced for leases entered into after May 11, 1938, but there were many leases in existence

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conclusion is borne out by the absence of any reference to prior acts either in the Interior regulations for new leases or in the leases themselves.

The intent of Congress to replace the earlier statutes prospectively is evident from the legislative history of the 1938 act. The act was proposed by the Secretary of Interior as legislation "to govern the leasing of Indian lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938). The Secretary noted several laws under which tribal lands could be leased: the 1891/1924 act; the Act of June 30, 1919, 41 Stat. 31; and the 1927 act authorizing oil and gas leasing on Executive Order lands. These laws were considered inadequate because 1) they were incomplete in their coverage; 2) under the 1919 act, tribes had no voice in whether lands would be opened to prospecting, and neither the Department of the Interior nor the tribe involved could prevent the acquisitions of a lease once tribal land was opened for prospecting; and 3) the existing law was not adequate to give the Indians the greatest economic return. The Secretary of the Interior therefore believed that the 1938 act "would be a more satisfactory law for the leasing of Indian lands for general mining purposes." S. Rep. No. 985 *supra* at 3; H.R. Rep. No. 1872 *supra* at 3. An intent to replace prior law with the 1938 act could not have been more clearly stated.

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in 1938 which had been executed under prior statutes including the 1891/1924 act. It is unlikely that Congress would have meant to alter these leases by making the 1938 act retroactive. Therefore, the prior statutes remain effective to govern pre-1938 leases.

To make the intent even more explicit, Section 7 of the 1938 act repealed "[a]ll Act [sic] or parts of Acts inconsistent" with the 1938 act. No specific acts were directly repealed (because of the need for the prior laws to remain effective as to existing leases), but the Secretary of the Interior was quite explicit about the inadequacies of prior law, and Congress clearly intended that the 1938 act would govern future leases because it would be "a more satisfactory law" for the leasing of tribal lands for mineral purposes. Prior law would no longer be effective for new leases.

Congress' intent to replace prior law is also shown by a significant change between prior bills and the bill that became the 1938 act. In 1935, bills were introduced in the House (H.R. 7681) and Senate (S.2638) to *"amend the law* governing the leasing of unallotted Indian lands for mining purposes." (Emphasis added). *See* 79 Cong. Rec. 6102 (1935); 79 Cong. Rec. 6257 (1935). The Secretary of the Interior's letter accompanying S.2638 is similar to his 1938 letter, but the 1935 letter stated that the bill would "effect no change in the present law for leasing oil and gas lands." S. Rep. No. 614, 74th Cong., 1st Sess. 3 (1935). In contrast, the 1938 act is an act to *"regulate the leasing* of certain Indian lands for mining purposes." (Emphasis added). In the Secretary's 1938 letter, the earlier statement about no changes in the oil and gas leasing law was deleted. S. Rep. No. 985, *supra,* and H.R. Rep. No. 1872, *supra.* These changes show Congress' intent to replace prior law, not just to amend it.

Administratively, the Department of the Interior has treated the 1938 act as a replacement for prior leasing laws. Since passage of the act, leases have been made

only under the 1938 act. New regulations governing mineral leasing were adopted on May 31, 1938. 25 C.F.R. part 186 (1938). The regulations were adopted to "carry these provisions [the 1938 act] into effect." 3 Fed. Reg. 1429 (1938). Prior regulations were expressly superseded. 25 C.F.R. 186.28 (1938). The regulations clearly track the language of the 1938 act and make no reference to the 1891/1924 act or other prior laws. Similarly, no references to the 1891/1924 act have been made in any notices of sale or leases since 1938. R. vol. II, doc. No. 52 (exh. E-1, E-2, E-3). Of the Blackfeet leases at issue, none made after 1938 mentions the 1891/1924 act. R. vol. II, doc. no. 52 (exh. A). On the other hand, those Blackfeet leases made before 1938 specifically recite the 1891 act as their authority, *id.*, a point strongly relied on by this Court in *British-American Oil Producing Co. v. Board of Equalization, supra,* 299 U.S. 159, 164 (1936).

Where an act covers the whole subject of an earlier act and is clearly intended as a substitute, the earlier act will be deemed replaced. *Kremer v. Chemical Construction Co.,* 456 U.S. 461, 468 (1982). Here Congress' intent to substitute the 1938 act for future leasing is clear from the face of the act and the legislative history. Moreover the existence of section 7 further shows the intent of the 1938 act as a comprehensive law which replaces prior laws. *See Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616-18 (1980).

D. Federal Administrative Interpretation of the Leasing Statutes Supports the Tribe's Position.

The 1924 tax consent provision has been interpreted by the Department of the Interior on several occasions,

but no administrative opinion until 1977 specifically addressed the issue before this Court. In 1977 the Solicitor for the Department of the Interior ruled that royalties received from leases made under the 1938 act are not subject to the 1924 act tax consent. 84 Interior Dec. 905 (1977) (Pet. App. 267). The Solicitor reasoned that the failure of the 1938 act to mention taxation created an ambiguity about the applicability of the 1924 act tax consent, and that this ambiguity must be resolved against state taxation under the principles established in *Bryan v. Itasca County*, 426 U.S. 373 (1976) and other applicable case law. The 1977 opinion is the first and only opinion to address the relationship of the 1924 and 1938 act outside of the direct repeal context. The opinion was followed in 1979 in an opinion addressing the same question involving Executive Order reservations. 86 Interior Dec. 181 (1979) (Pet. App. 316). Thus the only administrative opinions directly on point support the Tribe.

Montana and *amici* States argue that the validity of the taxes was recognized by the Department of the Interior until 1977, but their argument is not supported by administrative interpretation or practice or by anything in the record in this case. First, any administrative decisions or practices prior to 1938 are irrelevant. Obviously, the issue before this Court did not arise until the passage of the 1938 Mineral Leasing Act.[22]

Second, no opinion prior to 1977 considered the question presented to this Court, and no opinion before 1956

[22]British-American Oil Producing Co. v. Board of Equalization, *supra*, was decided in 1936, and the leases at issue specifically recited the 1891 act as the authority under which they were executed.

even mentioned the 1938 act. A 1943 opinion, 58 Interior Dec. 535 (1943) (Pet. App. 232), construed the scope of the 1924 act tax consent in the context of Blackfeet and Ute Mountain (New Mexico) leases executed under the 1891/1924 act. The opinion specifically relied on *British-American, supra*, for its conclusion that the leases were subject to state taxation. The opinion made no reference whatsoever to the 1938 act or to leases made under it.

An unpublished Solicitor's Opinion in 1954, Op. Sol. Int., Oct. 29, 1954 (M-36246) (Pet. App. 248), addressed the method of payment of taxes on Blackfeet leases made under the 1891/1924 act. The opinion assumed that the taxes were authorized based on *British-American* and the 1943 opinion. No independent analysis of the validity of the taxes was made. The opinion concluded that the 1924 act did not require the Secretary to pay the taxes directly, and that he could authorize the producers to pay the taxes and deduct them from tribal royalty payments. Again, the 1938 act was not even mentioned.

Another unpublished opinion in 1955, Op. Assoc. Sol., Oct. 13, 1955 (M-36310) (Pet. App. 258), concluded that tribal royalties from 1891 act oil and gas leases on the Fort Peck Reservation were taxable by the State. The opinion also relied on the 1943 opinion and *British-American* and did not mention the 1938 act.

The first opinions to consider the relationship between the 1924 act and the 1938 act came in 1956 and 1966. The 1956 opinion, Op. Assoc. So , May 4, 1956 (M-36345) (Pet. App. 262), addressed the issue of outright repeal of the 1924 act by section 7 of the 1938 act and concluded that the 1938 act did not remove the tax consent in

the 1924 act. The 1966 opinion, Letter to Sonosky dated Oct. 27, 1966, reprinted at 84 Interior Dec. 905, 914 (1977) (Pet. App. 301), merely cited the 1956 opinion on the repeal issue. Also, it focused almost exclusively on whether the 1924 act applied to the Fort Peck Reservation, that is, whether the reservation land had been "bought and paid for" within the meaning of the 1891 act, and whether the Montana Enabling Act and Constitution prohibited the taxes. Thus neither opinion is directly on point.

In addition, the opinions were rendered eighteen and twenty-eight years after the 1938 act and thus not contemporaneous with its passage. Neither opinion was approved or sanctioned by the Solicitor for the Department of the Interior, nor were they formally published. For these reasons, the opinions are entitled to little, if any, weight.[33] *See General Electric Co. v. Gilbert,* 429 U.S. 125, 140-46 (1976); *Weinberger v. Salfi,* 422 U.S. 749, 758 n.6 (1975).

Montana and *amici* States claim longstanding administrative recognition of the validity of state taxation of tribal royalties, but their claim simply is not borne out by a careful analysis of the administrative opinions or of any other evidence of record. No opinion focused on the relevant issue here. At most, the Department of the Interior recognized the validity of taxation of 1938 act leases only for the period between 1955 and 1977. Even then the issue was considered only in the context of direct repeal

[33]The 1956 and 1966 informal opinions were both made at a time when the official policy of the United States was to terminate all federal supervision over Indian tribes. *See* H. Con. Res. 108, 83d Cong., 2d Sess. (1954). It is not unlikely that the lower level Interior officials who made these opinions were influenced by this policy. Since the 1938 act was passed at another time and under a different policy, the termination policy ought to play no part in its interpretation.

of the 1924 act tax consent by the 1938 act and not in the terms argued here.

Montana argues that administrative practice shows that the Department of the Interior recognized the validity of the state taxes. However, state taxes have never been regularly and systematically paid to the State. As a result, the Department of the Interior has had little occasion to focus on the issue.

To begin with, 1938 act mineral leases did not begin producing immediately so as to make taxation an issue. Second, passage of the 1938 act did not itself trigger the question because at the time the Department of the Interior was not directly paying the taxes, nor has it directly paid any taxes since that time. The 1934 Indian Reorganization Act authorized tribal royalty payments to be paid directly to the tribes. Blackfeet leases therefore began requiring that royalty payments be made to the Tribe. *See* Op. Sol. Int., Oct. 29, 1954, *supra,* Pet. App. at 254. Under this arrangement the State apparently expected the Tribe to pay the taxes, but few, if any taxes were paid. *Id.* Montana therefore began billing the producer/lessees who in turn began putting pressure on Interior to authorize the producer/lessees to pay the taxes and to deduct the share attributable to the royalty from the royalty payments. *Id.* This method of payment was approved in 1954, and some taxes have been paid by producer/lessees since 1955.

Third, although payment of the taxes after 1955 was recorded in the records of the U.S. Geological Survey, those records show that no effort was made by Interior to enforce payment of the taxes. R. vol. II doc. no. 52 (exh. C). Payment was at most a hit or miss operation

with some companies paying taxes for some leases but not others, and some companies not paying at all.

Fourth, very few states were imposing taxes on tribal royalty interests. Only Montana and New Mexico were assessing taxes on these interests, and since 1977, Montana has been the sole state taxing tribal royalty interests. *See* Brief of *Amici* States at 23.[24] Thus, there was little pressure to consider the issue carefully.

These factors show that the Department of the Interior simply failed to deal directly with the issue of taxation of tribal royalties from leases executed under the 1938 act until 1977. Montana's and *amici* State's claim that Interior cooperated in and facilitated the payment of taxes does not stand up to scrutiny.[25] The only time Interior has directly confronted the issue raised in this case, it concluded that Montana taxes on tribal royalties were invalid.

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[24]*Amici* States say that Arizona also taxes Indian royalties, citing Industrial Uranium Co. v. State Tax Comm'n, 95 Ariz. 130, 387 P.2d 1013 (1963). This is not correct. The court expressly found that the legal incidence of the 1% business privilege tax there at issue was on the seller, not on tribal royalties. 387 P.2d at 1014.

[25]Even after Interior's 1977 opinion concluded Montana could not tax tribal royalties from leases made under the 1938 act, Montana continued to attempt to tax the royalties without any apparent protest from the Department of the Interior. Therefore, if anything is to be gleaned from the practice of Interior regarding payment of taxes, it is that Interior is guilty of total inaction—it acted neither to enforce payment nor to stop payments of the taxes.

E. Tribal Lands of a Self-Governing Indian Tribe Cannot Be Taxed by a State Based on Inferences from Ambiguous Laws.

The norm in Indian country is exemption of Indians and their property from state taxation. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973). In 1924 tax consent is an explicit departure from that norm, enacted at a time when Congress thought the reservations were going to wither away under the allotment policy. *See Mattz v. Arnett*, 412 U.S. 481, 496 (1973). The 1938 act, however, is silent on the subject of taxation. It was passed at a time when the policy of Congress favored tribal self-government, a policy that was carried out by the IRA, which expressly made new tribal trust lands under it tax exempt. 25 U.S.C. 465. Montana's attempt to apply the 1924 tax proviso to 1938 act leases at best rests on an ambiguous and uncertain reading of the 1938 act. But the Court has repeatedly said that laws authorizing state taxation of reservation Indians must be express, and ambiguous words will be construed against the State. *E.g., Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976). While the 1924 proviso by its terms does not apply to the 1938 act, this rule of construction is an added barrier that the State's argument has not overcome.

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CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

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NO. 83-2161

In The

Supreme Court of the United States

October Term, 1984

STATE OF MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE CROW TRIBE OF INDIANS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Amicus Curiae Crow Tribe of Indians is the beneficial owner of vast mineral resources, especially coal, located within both the acknowledged boundaries of the 2,500,000 acre Crow Indian Reservation and a 1,100,000 acre tract immediately to the north of the acknowledged Reservation known as the "ceded strip" or "ceded area." In 1975, Montana enacted a severance tax on the production of coal and a gross proceeds tax on the sale of coal. Mont. Code Ann. §§ 15-35-101 through 15-35-111 and 15-23-701 through 15-23-704. The rate of the severance tax varies from three to thirty percent of the value of the coal, depending upon the quality of the coal and how it is mined. Mont. Code Ann. § 15-35-103. It was specifically intended to enable the State of Montana to share in the profits associated with the extraction of coal, to obtain the maximum economic rent from the production and sale of coal, and to slow the growth of coal production in Montana. Mont. Code Ann. § 15-35-101; *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 639-41 (1981) (Blackmun, J. dissenting); *Crow Tribe v. Montana,* 650 F.2d 1104, 1113 (9th Cir. 1982), *modified,* 665 F.2d 1390 (9th Cir. 1982), *cert. denied,* 459 U.S. 916.

Crow coal on the ceded strip has been mined since 1974 pursuant to a 1938 Act lease. Since 1975, that coal has been taxed at the maximum statutory rate of 30 percent. In addition, the Tribe's lessee has paid Montana's gross proceeds tax at a rate of approximately five percent of the value of the coal. From 1976 through 1982, the Tribe's lessee paid approximately $55,000,000 in state coal taxes as compared with approximately $14,400,000 in royalties to the

Tribe. Moreover, since 1975, the production of coal in Montana has remained relatively constant at approximately 20 to 30 million tons per year whereas the similar coal produced in Wyoming, whose coal taxes are approximately half those of Montana's,[1] increased from about 25 million tons per year to more than 100 million tons. See the graph reproduced in the Appendix to this Brief.[2]

The Crow Tribe brought suit against the State of Montana in 1978 to invalidate Montana's entire severance and gross proceeds taxes as applied to the production and sale of both Reservation coal and the Tribe's coal located within the ceded strip. That case is now pending for decision before the United States District Court for the District of Montana (*Crow Tribe v. Montana,* Civil No. 78-110 BLG) following remand from the United States Court of Appeals for the Ninth Circuit (*Crow Tribe v. Montana,* 650 F.2d 1104 (9th Cir. 1981), *modified,* 665 F.2d 1390 (9th Cir. 1982), *cert. denied,* 459 U.S. 916), and a 2½ week trial held in January 1984. The Crow Tribe has a direct stake in the outcome of the instant case because Montana has defended its taxes on Crow coal on the grounds, *inter alia,* that state taxes on the coal produced under the May 11, 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq.* (Pet. App. 175), are authorized by the Act of February 28, 1891, 25 U.S.C. § 397 (Pet. App. 150), as amended by the Act of May 29, 1924, 25 U.S.C. § 398 (Pet. App. 152). Similar issues are involved in this case.

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1 *See* Commonwealth Edison Co. v. Montana, *supra,* 453 U.S. at 640 n.5 (Blackmun, J. dissenting).

2 The graph reproduced in the Appendix is based on public information obtained from the Keystone Coal Industry Manual and the National Energy Information Center of the Department of Energy.

The petitioners and the respondent have consented in writing to the filing of this Amicus Curiae Brief by the Crow Tribe. Copies of those letters are being lodged with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The sole question presented by this case is whether states are legally authorized to impose taxes on tribal royalties obtained under the terms of mineral leases executed pursuant to the Act of May 11, 1938, 25 U.S.C. §§ 396a-396g (Pet. App. 175). Since states cannot tax Indian income or Indian property in the absence of express congressional authorization, *Bryan v. Itasca County,* 426 U.S. 373, 375-76 and n.2 (1976); *McClanahan v. Arizona Tax Comm'n.,* 411 U.S. 164, 170-71 (1973); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973), the dispute in this case is limited to the legal issue of whether "Congress has expressly provided that state laws shall apply." *Bryan v. Itasca County, supra,* 426 U.S. at 376 n.2; *McClanahan v. Arizona Tax Comm'n., supra,* 411 U.S. at 170-71.

Different tests and principles are involved when states tax the conduct, property or activities of non-Indians engaging in Indian related commerce. Such cases call for "a particularized [factual] inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law" and is therefore pre-empted. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980). Because this case involves only a challenge to the applicabil-

ity of state taxes on tribal royalties (as opposed to a claim that the entire state taxes on tribal oil and gas is pre-empted by federal Indian law), there has not been an occasion or an opportunity to develop a factual record concerning the impact of Montana's oil and gas taxes on the particular state, federal and tribal interests at stake in the development of tribal oil and gas by non-Indian producers. *Cf. New Mexico v. Mescalero Apache Tribe,* — U.S. —, 103 S.Ct. 2378 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker, supra.*

2. This distinction assumes particular importance in the context of this case owing to Section 7 of the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 348 (Pet. 6; Pet. App. 175), which states: "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."[3] Under this provision, even if the consent to tax provision of the 1891/1924 Act applies generally to 1938 Act leases, the door is open for Indian tribes and/or the United States to prove in the context of a specific factual setting that a particular state tax is inconsistent with the 1938 Act and therefore violates federal law.

One of the express purposes of the 1938 Act was "to give the Indians the greatest return from their property." H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 3 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. at 3 (1937). It is inconceivable that the Congress intended to permit state taxes on tribal mineral production which prevent or discourage the development of tribal minerals and result in a

[3] Section 7 is not codified in the United States Code. *See* 25 U.S.C.A. § 396a (historical note).

state receiving revenues that are 400 percent greater than the royalties paid to the tribe. Section 7 of the 1938 Act operates as an express repeal of the 1924 tax consent provision to the extent necessary to carry out the purposes of the 1938 Act.

Admittedly, this issue is not directly presented by the limited challenge to Montana's taxes on tribal royalties presented in this case, but the operative effect of Section 7 in the broader Indian pre-emption context nevertheless should be kept in mind in considering the relationship between the 1938 Act and the tax proviso to the 1924 Act. A decision against the Blackfeet Tribe in this case should not foreclose a tribe or the United States from contending and proving that any particular state tax is inconsistent with the 1938 Act and that Section 7 of the 1938 Act repeals the tax proviso to the 1924 Act to the extent that any such tax previously might have been sanctioned by that proviso.

3. Prior to 1938, there was a hodgepodge of several different Indian mineral leasing statutes which imposed different requirements on different Indian lands. One of the specific purposes of the 1938 Act was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H.R. Rep. No. 1872, *supra,* at 1; S. Rep. No. 985, *supra,* at 2. This objective would be defeated if portions of the prior laws remained applicable to some, but not all, of the Indian lands that are subject to lease pursuant to the 1938 Act. The particular situation of the Crow Tribe illustrates the difficulty, the senselessness and the lack of uniformity that would result from upholding the petitioners' position.

ARGUMENT

I. The 1924 Consent To Tax Proviso Is Expressly Repealed By Section 7 Of The 1938 Act To The Extent Necessary To Carry Out The Purposes Of The 1938 Act.

In enacting the 1938 Indian Mineral Leasing Act, Congress recognized that some prior laws might be inconsistent with the policies and objectives underlying the new law. Accordingly, Section 7 of the 1938 Act, 52 Stat. 347, 348 (Pet. App. 175) (uncodified) provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Under Section 7 prior federal laws, including the consent to tax proviso in the 1924 Act, must give way to the extent necessary to effectuate the purposes and policies of the 1938 Act.

The 1938 Act was intended to "bring all [Indian] mineral leasing matters in harmony with the Indian Reorganization Act" (IRA) of 1934, 25 U.S.C. §§ 461 *et seq.* H.R. Rep. No. 1872, 75th Cong., 3d Sess., at 3 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. at 3 (1937). The broad policies of the IRA were "to foster tribal self-government and economic development." *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 155 (1980). *See also, White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 n.10 (1980); *Fisher v. District Court,* 424 U.S. 382, 387 (1976); *Morton v. Mancari,* 417 U.S. 535, 542 (1974). One of the express purposes of the 1938 Act, which also conforms to the policies of the IRA, was "to give the Indians the greatest return from their property." H.R. Rep. No. 1872, *supra,* at 2; S. Rep. No. 985, *supra,* at 2.

Thus, state mineral taxes that deprive Indian tribes of substantial revenues and have the effect of preventing

or discouraging the development of tribal minerals are manifestly inconsistent with the objectives of the 1938 Act. *See Crow Tribe v. Montana, supra,* 650 F.2d at 1112-14; *supra* at 1-2, 4-5. The Crow Tribe agrees with the position of the Blackfeet Tribe that 1924 tax proviso has no application at all to 1938 Act leases. Even if it is assumed, however, that the 1924 tax proviso continues to apply to some taxes on 1938 Act leases, it does not necessarily follow that the 1924 Act sanctions all such state taxes. Section 7 of the 1938 Act expressly repeals the 1924 Act to the extent that any of its provisions are inconsistent with the purposes of the 1938 Act.

Amicus Crow Tribe recognizes that the instant case only involves a limited challenge to Montana's taxes on the production of oil and gas as applied to the Blackfeet Tribe's royalty interest. *See supra* at 3-4. But the operative effect of Section 7 in the broader Indian pre-emption context nevertheless should be kept in mind in considering the relationship between the 1938 Act and the tax proviso to the 1924 Act. While the Crow Tribe fully supports the position of the Blackfeet Tribe, it should be recognized that a decision against the Tribe in this case should not foreclose a tribe or the United States from contending and proving that: (a) any particular state tax is inconsistent with the 1938 Act; (b) that the 1924 Act does not sanction any such tax in light of Section 7 of the 1938 Act; and (c) that any such tax violates applicable federal law and is therefore pre-empted under the principles of *New Mexico v. Mescalero Apache Tribe,* — U.S. —, 103 S.Ct. 2378 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982); *Merrion v. Jicarilla Apache Tribe,* 455

U.S. 130, 158 n.26 (1982); and *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

II. Upholding The Petitioners' Position Would Thwart The Uniformity Purpose Of The 1938 Act.

Prior to 1938, several different Indian mineral leasing laws imposed different requirements on different Indian lands. *See* H.R. Rep. No. 1872, *supra,* at 1; S. Rep. No. 985, *supra,* at 1-2. One of the specific purposes of the 1938 Act was to correct this problem by "obtain[ing] uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." *Ibid.* This purpose was achieved by enacting a new law, the 1938 Act, which specifically applies to all "unallotted lands within any Indian reservation" regardless of how the reservation was established as well as to any "lands owned by any tribe, group, or band of Indians under Federal jurisdiction" except for those tribal lands that are specifically excluded from the provisions of the 1938 Act by Section 6, 25 U.S.C. § 396f. 25 U.S.C. § 396a. In addition, the new law was expressly made applicable to mineral leases made "hereafter," i.e. "on or after May 11, 1938." 25 U.S.C. § 396a.[4] On its face the 1938 Act is comprehensive and

[4] The statute provides that "hereafter, unallotted lands . . . may . . . be leased for mining purposes . . ." The word "hereafter" was changed to "on and after May 11, 1938" when the statute was codified.

stands entirely on its own. The plain language of 25 U.S.C. § 396a and the rest of the 1938 Act, read in light of the objective of achieving uniformity, leave no doubt that Congress did not intend to incorporate any provisions of the preexisting statutory hodgepodge.

If the petitioners' position is upheld, the uniformity purpose of the 1938 Act would be defeated. In order to determine whether states are authorized to tax tribal royalties or production from tribal leases under the 1938 Act, courts would have to examine the tax provisions of the pre-1938 laws. There are obvious and large gaps in the coverage of these provisions.

For example, the only general, pre-1938 statute authorizing mineral leases of unallotted Indian lands within statutory reservations established unilaterally by Congress is the Act of June 19, 1919, 25 U.S.C. § 399. This Act is restricted by its terms to nine named states. States with substantial Indian lands, including, Utah, Colorado, South Dakota, North Dakota, Minnesota and Wisconsin, among others, are excluded from its coverage. The tax provision of this statute differs markedly from the 1924 Act and obviously would not be sufficient to permit taxation of tribal royalties. It states:

> *Protection of interests of Indians.* The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided,* that nothing in this section shall be construed or held

> to affect the right of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

This provision appears to do nothing more than insure that the Secretary's rules and regulations have no effect on otherwise valid state taxes on non-Indian lessees. Thus, it appears that the output of mines located on tribal lands within all statutory reservations would not be subject to any congressionally authorized state taxes. It would be anomolous and anything but uniform to permit state taxes on tribal royalties on treaty reservations but not on reservations established by unilateral acts of Congress.

Mineral lands located outside the boundaries of Indian reservations are another example of a major gap in the pre-1938 law. *Cf.* 30 U.S.C. §§ 1291(9), 1300. The tax authorizations in both the 1924 Act, applicable to "bought and paid for" lands, and the 1927 Act, 25 U.S.C. § 398c, applicable to the lands established by Executive Order, are expressly limited to the output of mines or wells located "on" or "within" Indian reservations. This creates a truly anomolous situation under which, if the petitioners prevail, tribally owned, off-reservation minerals would not be subject to any congressionally authorized state taxes while states would be able to tax tribal mineral production as well as tribal royalties on the reservation pursuant to the tax provisions of the 1924 and 1927 Acts. *Cf. Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973).

A third major gap in pre-1938 law relates to the taxation of tribal minerals other than oil and gas on Executive Order Reservations. The production of oil and gas on such reservations presumably would be subject to state taxes

pursuant to the 1927 Act, 25 U.S.C. §§ 398a, 398c if the petitioners prevail here. But the production of other minerals on such reservations within the nine listed states pursuant to the 1919 Act, 25 U.S.C. § 399, apparently would not be subject to any congressionally authorized state taxes.

These anomolies are illustrative of the problems, uncertainties, difficulties and havoc that would be created by a ruling upholding the petitioners' position. Nor is it at all certain that such problems would be limited to tax questions. If the tax proviso to the 1924 Act is carried forward and applied to 1938 Act leases, there is no apparent justification for denying similar treatment to other provisions of pre-1938 laws. This, of course, is exactly what Congress attempted to avoid by making leases on or after May 11, 1938 on all Indian lands except those specifically excepted subject to uniform treatment.

The particular situation of the Crow Tribe also illustrates the uncertainty and lack of uniformity that would be created if the petitioners' position is upheld. Mineral leasing on the Crow Reservation was the specific subject of a pre-1924 statute, Section 6 of the Crow Allotment Act of June 4, 1920, 41 Stat. 751, 753, as amended by the Act of May 26, 1926, 44 Stat. 658, 659. These provisions make no mention of state taxes. It is doubtful whether the 1924 Act was ever applicable to the Crow Reservation. This conclusion is strengthened by the express exclusion of the Crow Reservation from the 1938 Act, 25 U.S.C. §396f, presumably because the leasing of Crow minerals was governed by the specific provision in the Crow Allotment Act. *See* F. Cohen, *Handbook of Federal Indian Law* 329 n.471

(1942 ed.)[5] It was not until 1959 that Congress subjected Crow mineral leasing to the 1938 Act. Act of September 16, 1959, 73 Stat. 565. *See also*, Act of May 17, 1968, 82 Stat. 123. These subsequent laws do not mention or refer to state taxes or to the 1924 Act. Needless to say, if Crow mineral leasing was never made subject to the 1924 Act, the tax proviso to that Act cannot possibly be construed as authorizing state taxation of Crow mineral production. Moreover, as previously noted, the Crow Tribe's off-reservation minerals, are not made subject to any Congressionally authorized state taxes.

Whether or not Crow mineral development was ever subject to the 1924 Act should now be a moot point. Congress has passed a new law designed to implement different policies and to be applied uniformly without regard to outmoded distinctions. In 1938, Congress clearly intended to eliminate the ghosts that had haunted the past by starting over on a clean slate. That purpose would be frustrated by reading the 1938 Act as incorporating or carrying forward the consent to tax proviso to the 1924 Act.

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[5] British American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), is not to the contrary. The primary basis for the Court's conclusion that the Blackfeet oil and gas leases in question in that case were granted under both the general 1891 and 1924 statutes and the specific Blackfeet mineral leasing statute was that the leases expressly recited that they were issued under the 1891 and 1924 Acts. Further, the terms of Section 6 of the Crow Allotment Act are considerably more detailed and specific than the more general provisions of the Blackfeet statute and are also inconsistent with some provisions of the 1924 Act. Until recently, Crow minerals were subject to a different and separate set of leasing regulations that were issued pursuant to Section 6 of the Crow Allotment Act. 25 C.F.R. p.173 (1979)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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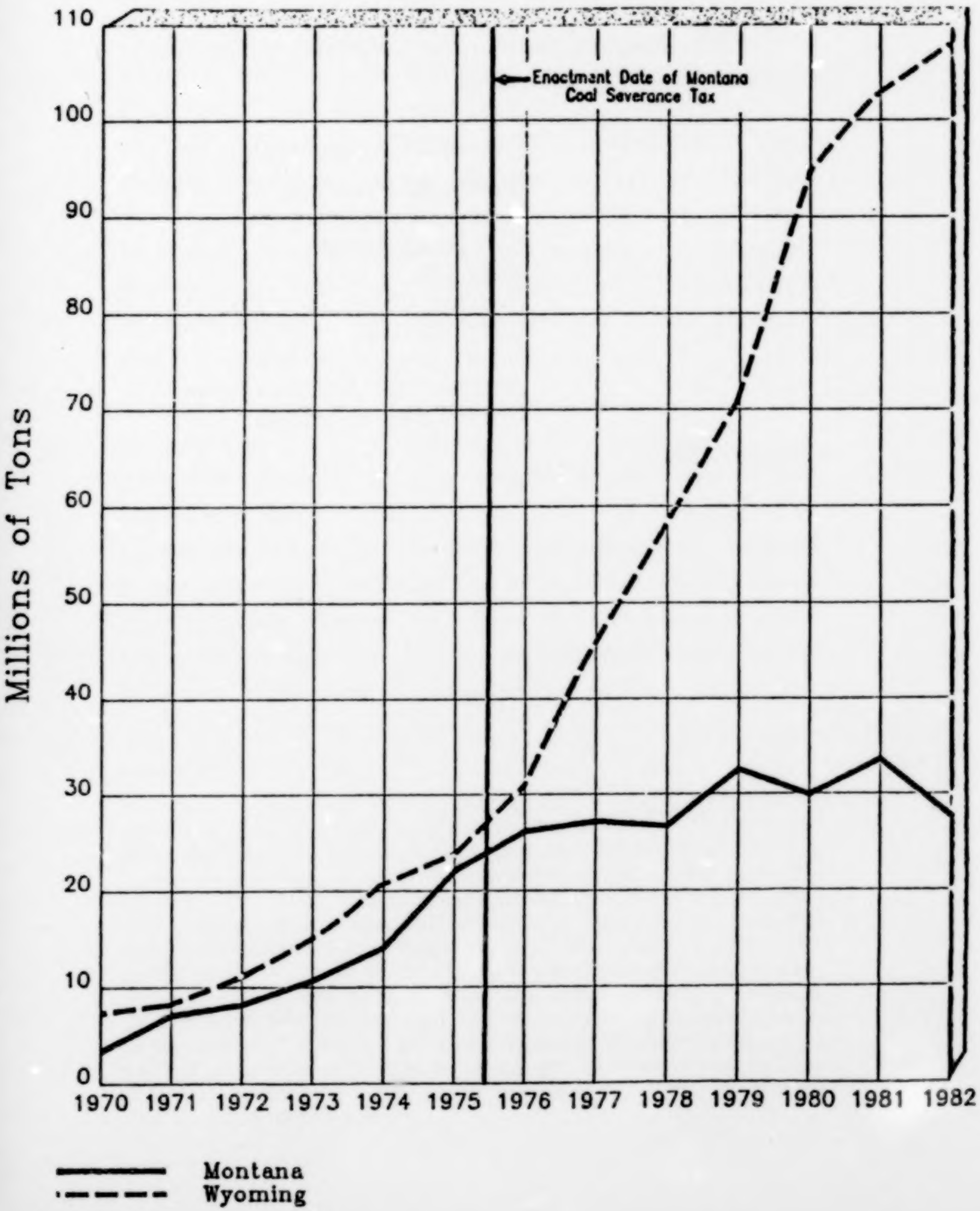
December 1984

MONTANA AND WYOMING COAL PRODUCTION
1970 – 1982



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No. 83-2161

In The
Supreme Court of the United States
October Term, 1984

STATE OF MONTANA, *et al.*,
Petitioners,
vs.
BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF COTTON PETROLEUM CORPORATION, WINTERSHALL OIL & GAS CORPORATION, AND ROCKY MOUNTAIN OIL AND GAS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE BLACKFEET TRIBE OF INDIANS

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BRIEF OF COTTON PETROLEUM CORPORATION, WINTERSHALL OIL & GAS CORPORATION, AND ROCKY MOUNTAIN OIL AND GAS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE BLACKFEET TRIBE OF INDIANS

With the written consent of all parties, the amici curiae Cotton Petroleum Corporation, Wintershall Oil & Gas Corporation, and the Rocky Mountain Oil and Gas Association (RMOGA) respectfully submit this brief as amici curiae on behalf of themselves and on behalf of the members of RMOGA. Amici have filed the consent of all parties with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Cotton Petroleum Corporation is an oil and gas producer which has substantial oil and gas production throughout the West including production on the Jicarilla Indian Reservation in New Mexico. Cotton is currently subject to both Jicarilla tribal severance taxes and five New Mexico taxes imposed on oil and gas production. In an effort to free its reservation production from overlapping state and tribal taxation, Cotton Petroleum Corporation has initiated state tax refund litigation in the state courts of New Mexico. *Cotton Petroleum Corporation v. State of New Mexico, Consolidated* Nos. SF82-2081(C) and 82-2302(C), Santa Fe District Court, New Mexico.

Wintershall Oil and Gas Corporation conducts oil and gas exploration and production operations in the West and has recently acquired substantial oil and gas reserves on the Ute Mountain Ute Indian Reservation which is located

in Colorado and in New Mexico. Wintershall's Ute Mountain Ute Reservation oil and gas activities are subject to both a tribal severance tax and a broad array of Colorado and New Mexico oil and gas taxes.

RMOGA is a voluntary non-profit association whose purpose is to promote discovery, development, production and conservation of oil and gas in the Rocky Mountain region. RMOGA's 600 members are involved in all phases of the oil and gas industry and related businesses, and many of its members are engaged in oil and gas production on western Indian reservations, which production is subject to overlapping tribal and state taxation.

The present case is of special importance to the amici curiae. The companies as well as the members of RMOGA have entered into leases or joint ventures on Indian reservations which further the federal policies of making the reservations economically self-sufficient. The decision of the Ninth Circuit prohibiting the states from imposing their full array of oil and gas taxes should be upheld by the Supreme Court. The Ninth Circuit decision is consistent with recent decisions of this Court in the federal/Indian preemption area which suggest that the states can only impose their mineral production taxes when required to support specific state regulatory responsibility or state services on the Indian reservations.[1] Further, given the increasing tribal taxes now being imposed on reservation mineral production, the court of appeals ruling prevents an onerous double taxation burden from being imposed on Amici Curiae, and encourages companies such as Amici Curiae to remain on the reservations to undertake mineral production free of the fear that competing tribal and state taxing authorities will render reservation mineral activity uncompetitive.

[1]Significantly, the Ninth Circuit remanded this case to the district court to determine whether, under contemporary federal/Indian preemption cases, the Montana taxes should be imposed on producers such as Amici Curiae. *Blackfeet Tribe of Indians,* 729 F.2d 1192, 1203 (9th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3235 (1984).

SUMMARY OF ARGUMENT

Amici Curiae, mineral producers on Indian reservations, submit this Brief Amici Curiae in order to alert the Court to the presence of substantial overlapping state and tribal taxes imposed on reservation mineral production. The combined state and tribal tax burden is substantial. It continues to increase. Because the states and the tribes exist as separate and often hostile taxing entities, amici curiae are not confident that each taxing entity will accomodate the legitimate interests of the other. An existing body of federal law, the Indian preemption case law, should be utilized by this Court to limit state taxes to only that level required to finance state services actually provided reservation mineral activity. These principles, embodied in recent decisions of this Court and described in this Brief, should be incorporated by this Court in its affirmance of the Ninth Circuit decision in this case.

I.

Overlapping State and Tribal Taxation is Unfair to Reservation Mineral Developers.

If this Court permits the western states to impose the full array of state mineral taxes on the reservations with-

out limiting the amount of the state taxes to only those taxes required to support specific state services provided on the reservations, companies such as amici curiae will be subject to overlapping/double taxation and will have been penalized for undertaking economic development activities on the reservations. As we shall next show, the problem of overlapping state and tribal taxation is creating for amici curiae an intolerable financial burden.[2] If not stopped, energy companies will, over time, leave the reservations to spend their development monies in off-reservation locations where the tax burdens are substantially lower.

The problem of overlapping/double state and tribal taxes is rapidly making the reservations uncompetitive. For example, the oil and gas activities of Cotton Petroleum Corporation and other amici curiae doing business on the Jicarilla Reservation are subject to five New Mexi-

[2]The Amici Curiae Brief of New Mexico *et al.* contends that because this case technically only involves the question of Congress' authorization to Montana to tax the Blackfeet Tribe's royalty share of production, this Court need not consider the larger question of whether Congress has by statute authorized the full array of state mineral taxes on producers such as amici curiae. The states are wrong. Indeed the Petitioner, the State of Montana, concedes that if the Ninth Circuit decision is reversed, "all taxes on production will be permissible", *Brief for Petitioners*, p. 15, n.5. If this Court rules that indeed Congress' enactments of May 29, 1924 (codified at 25 U.S.C. § 398) and of March 3, 1927 (codified at 25 U.S.C. § 398c) provide the states with a blanket authorization to tax tribal royalty income, this Court will necessarily have construed the statutes to mean that Congress has granted the states the unlimited right to tax all Indian reservation mineral production and not simply the royalty share of such production. Hence Amici Curiae and all producers on the reservations have a vital interest in determining whether the states can continue to tax all reservation production even though the states have only minimal responsibilities on the reservations.

co taxes.[3] Those amici curiae doing business on the Jicarilla Indian Reservation in New Mexico are also subject to a substantial Jicarilla tribal tax of .05¢ per million British thermal units of gas and $.29 per barrel of crude oil.[4] During just five years, 1977-1982, the New Mexico taxes have generated approximately $35,000,000 from the Jicarilla Reserv tion alone.[5] As a result of these double taxes, oil and gas producers on the Jicarilla Reservation in New Mexico pay $3.00 to the State of New Mexico for every $1.00 they pay to the Jicarilla Apache Tribe.[6]

Coal producers doing business on the Navajo Indian Reservation in New Mexico face a similar overlapping double tax burden. Such coal producers must pay to the State of New Mexico and its counties a total of nine taxes arising out of surface coal mining activities on the Navajo Reservation.[7] These taxes, when combined, create an ag-

[3]The five New Mexico taxes are: New Mexico Oil and Gas Severance Tax, N.M. Stat. Ann. (1978) § 7-29-1 *et seq.;* New Mexico Oil and Gas Conservation Tax, N.M. Stat. Ann. (1978) § 7-30-1 *et seq.;* New Mexico Oil and Gas Emergency School Tax, N.M. Stat. Ann. (1978) § 7-31-1 *et seq.;* New Mexico Oil and Gas Ad Valorem Production Tax, N.M. Stat. Ann. (1978) § 7-32-1 *et seq.;* and New Mexico Oil and Gas Production Equipment Ad Valorem Tax, N.M. Stat. Ann. (1978) § 7-34-1 *et seq.*

[4]*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136 (1982) (describing Jicarilla Apache tribal taxes).

[5]*See* unrebutted Affidavit of Christina Kirschner submitted in support of a memorandum of law in opposition to New Mexico motion for summary judgment, filed July 9, 1984 in *Cotton Petroleum Corp. et al. v. State of New Mexico, supra* p.2.

[6]*Id.*

[7]New Mexico Gross Receipts and Compensating Tax, N.M. Stat. Ann. (1978) § 7-9-1 *et seq.;* County Fire Protection Ex-

(Continued on next page)

gregate burden in excess of $25,000,000 on the 12 million tons of Navajo coal produced each year which are subject to New Mexico taxes. At the same time, the Navajo Tribe purports to impose a possessory interest tax measured by the valuation of the property rights under a lease granted by the Navajo Tribe and a business activity test measured by a percentage of the gross receipts received from the sale of the coal. If and when these two taxes are imposed on coal production on the Navajo Reservation now subject to the full array of New Mexico taxes, the Tribe will receive revenues which are approximately equal to the $25,000,000 in revenues now being derived by New Mexico. The legality of the Navajo tribal taxes is presently before this Court in ***Kerr-McGee Corporation v. Navajo Tribe of Indians,*** 731 F.2d 597 (9th Cir. 1984), *cert granted,* 105 S. Ct. 242 (1984).

Wintershall Oil and Gas Corporation has both a 93,000 acre lease and a 250,000 acre joint venture agreement with the Ute Mountain Ute Tribe on the Tribe's reservation located in New Mexico and Colorado. Wintershall oil and gas production occurring in New Mexico could be subject to the five New Mexico taxes summarized above as applicable on the Jicarilla Indian Reservation. Production on the Ute Mountain Ute Reservation within the geographical boundaries of the State of Colorado could be subject to State of Colorado property taxes and severance

(Continued from previous page)

cise Tax, N.M. Stat. Ann. (1978) § 7-20A-1 *et seq.;* County Sales Tax, N.M. Stat. Ann. (1978) § 7-21-1 *et seq.;* New Mexico Resources Excise Tax, N.M. Stat. Ann. (1978) § 7-25-1 *et seq.;* New Mexico Severance Tax, N.M. Stat. Ann. (1978) § 7-26-1 *et seq.;* New Mexico Oil and Gas Conservation Tax, N.M. Stat. Ann. (1978) § 7-30-1 *et seq.;* New Mexico Property Taxes, N.M. Stat. Ann. (1978) § 7-35-1 *et seq.;* and New Mexico Income and Franchise Taxes N.M. Stat. Ann. (1978) § 7-2-1 *et seq.,* § 53-3-11 *et seq.*

taxes.[8] The combined impact of the Colorado taxes creates a tax burden which equals approximately 3% of the gross revenues derived from oil and gas production on the reservation. At the same time reservation oil and gas production is subject to a 5% tribal severance tax.

The pattern of overlapping/double state and tribal taxation which we have seen in New Mexico and Colorado occurs throughout the West. In Wyoming for example, Wind River Indian Reservation oil and gas production is subject to Wyoming property taxes and severance taxes which together approximate 12% of the value of production.[9] At the same time Wind River Reservation oil and gas production may be subject to a 4% tax imposed by the Shoshone and Arapahoe Tribes of the Wind River Reservation. The tribal tax is currently the subject of litigation which is awaiting a decision by this Court in ***Kerr-McGee Corp. v. Navajo Indian Nation, supra,*** p.7. *See* ***Conoco Oil Inc. v. Shoshone and Arapahoe Tribes,*** 569

[8]Colo. Rev. Stat. (1973) § 39-5-101 *et seq.,* (1973) (property taxes); Colo. Rev. Stat. (1973) § 39-29-101 *et seq.* (1973) (severance taxes). Wintershall uses the phrase "could be" because a portion of the reservation oil and gas production is undertaken pursuant to a joint venture issued pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. § 2102 *et seq.* In that 1982 Act, Congress expressly instructed that mineral joint ventures created under the new legislation would not be subject to any pre-existing acts of Congress relating to mineral development on Indian lands. 25 U.S.C. § 2105. Hence any state taxation which might be applied to such joint venture mineral production would be imposed not on the basis of any express congressional authorization, but rather on the basis of the federal/Indian preemption principles discussed in this Amici Curiae Brief.

[9]See Wyo. Stat. (1977) §§ 39-6-302; 39-2-202.

F. Supp. 801 (D. Wyo. 1983), *appeal docketed,* Nos. 83-2243, 83-2255 (10th Cir. Sept. 22, 1983, Sept. 28, 1983).

The amount of money derived from these overlapping/double tribal and state taxes is substantial. For example in a case on remand involving overlapping state and tribal taxes, the District Court of Montana will shortly decide whether $55,000,000 in severance and gross proceeds taxes paid to the State of Montana from the production and sale of Crow Indian coal should be paid to the Crow Tribe, which during the relevant period of time received slightly over $14,000,000 in coal royalties. *Crow Tribe of Indians v. Montana,* 469 F. Supp. 154 (D. Mont. 1979), *rev'd,* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390 (9th Cir.), *cert. denied,* 459 U.S. 916 (1982). It is apparent from this brief survey of reservation mineral production that companies doing business on the Indian reservations in the West are paying millions of tax dollars to the states and ever increasing amounts of tribal taxes to the Tribes. If this Court does not act in the present case and in *Kerr-McGee Corporation v. Navajo Indian Nation, supra* p.7 to assure that the combined burden of taxes on the reservation is equivalent to the mineral tax burden off the reservations, the mineral industry will over time leave the reservations to undertake mineral production elsewhere.

II.

Permitting Overlapping/Double Tribal and State and Tribal Taxes is not Justified Given The States' Minimal Responsibilities On the Reservations.

Congress, which created and maintains the western Indian reservations, and the western state legislatures, which enact state mineral taxes and direct where those tax

revenues are to be spent, have consistently minimized the expenditure of state revenues on the reservations. As a result, this Court should not permit states to enact overlapping taxes, to generate substanial revenues from the reservations, and then to spend those revenues elsewhere. Indeed, to permit this taxing and spending pattern to continue raises the likelihood of a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See Zobel v. Williams,* 457 U.S. 55 (1982) (the unequal distribution of state tax revenues violates the Equal Protection Clause).

In our judgment, it is essential that this Court create a mineral taxing policy for the reservations which does not fundamentally undermine what this Court has previously stated as the federal purpose of establishing the reservations—namely to provide the Indians with a permanent means of livelihood—the right to use the lands, the minerals, fish game, wild plants, and waters of the reservation for their self-support. *See, e.g., Menominee Tribe v. United States,* 391 U.S. 404 (1968); *Squire v. Capoeman,* 351 U.S. 1 (1956); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Winters v. United States,* 207 U.S. 564 (1908); *United States v. Winans,* 198 U.S. 371 (1905). This Court has confirmed that the federal purpose in establishing the reservations in the first place was to permit the Indians to earn a livelihood free of disruption from non-Indians on the reduced holdings created when larger portions of Indian lands were ceded, through the use of farming, raising livestock, timber, and mineral development. *Winters v. United States,* 207 U.S. at 576-77; *United States v. Rickert,* 188 U.S. 432, 443-44 (1903).

This Court has not only recognized the federal policy of preserving the reservations as a permanent Indian homeland, but also has long recognized that the states do not legislate for or expend substantial state revenues on the reservation:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.
>
> . . . And since federal legislation has left the State with no duty or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 690-691 (1965) (citation omitted).

In recent years the Court has confirmed on numerous occasions that it is the federal and tribal governments and not the state governments which have the financial and legal responsibility for enhancing the economic development of the reservations. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 103 S. Ct. 2378 (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 45? U.S. 832 (1982); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Each of these cases (except for *Merrion v. Jicarilla Apache Tribe*), resulted in a decision by this Court prohibiting the imposition of overlapping state taxes on reservation activity, because in each case the states could not establish the requisite state interest or responsibility on

the reservation to justify the extraction of substantial state revenues. In *White Mountain Apache Tribe*, this Court prevented Arizona state taxation because the taxes were not "assess[ed] in return for governmental functions it performs for those on whom the taxes fall". 448 U.S. at 150. This Court concluded that Arizona's general desire to raise revenue was not sufficient, because the Court was "unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads." 448 U.S. at 150.[10] Similarly, in *Ramah*, after finding that the federal government's direction and supervision of the construction of Indian schools left no room for the additional responsibilities and burdens of the state tax, this Court noted: "This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children." 458 U.S. at 843 n.7. The fact that New Mexico provided services to the non-Indian construction company in connection with its off-reservation activities was deemed to be irrelevant. 458 U.S. at 844 (" . . . we fail to see how these benefits can justify a tax imposed on the construction of school facilities on *tribal* lands" . . . (emphasis in original)).

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[10]The Amici Curiae Brief of New Mexico *et al.*, p. 19, misleads this Court when it restates *White Mountain Apache Tribe* to imply that this Court has already acknowledged that state taxation of reservation mineral production is justified because of state services provided on the reservations in response to reservation mineral development. To the contrary, the States provide at best minimal mineral development related services. *See infra*, p. 14 (for a discusssion of mineral related state services provided the reservations).

Finally in *New Mexico v. Mescalero Apache Tribe, supra* p.10 (involving the efforts of New Mexico to impose fees on a hunting and fishing program financed and administered on tribal lands by the Mescalero Apache Tribe), the Court emphasized the need for the states to demonstrate that their taxes imposed on the reservation are required to support reservation services:

> The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity (citation omitted). Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues . . . .

103 S. Ct. at 2387.

In applying this rule and preventing New Mexico from imposing its fees, this Court concluded, "New Mexico does not contribute in any significant respect to the maintenance of these [fish and wildlife] resources, and can point to no other 'governmental functions it provides' . . . in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority." 103 S. Ct. at 2390.

These cases confirm that only in unusual circumstances will overlapping/double tribal and state taxation be permitted on the reservations—namely under those statistically rare circumstances where a state can point to a specific responsibility on the reservation which requires the expenditure of substantial state revenues. While there exists no fully developed court record showing the presence or absence of state involvement in reservation mineral development, the available data suggests that,

indeed, state responsibility for reservation mineral and oil and gas development is typically as non-existent as this Court has found state responsibility for reservation forestry, *White Mountain Apache, supra* p.10, reservation school construction *Ramah Navajo School Board, supra* p.10, and reservation hunting and fishing *New Mexico v. Mescalero Apache Tribe, supra* p.10.[11] Furthermore, a review of the western state oil and gas and coal tax statutes will demonstrate that in most cases substantial portions of the revenues generated from such taxes are either placed in segregated funds, often held in specifically created legislative trusts, to pursue itemized state priorities (such as education and water resources) or are distributed for use by state and local subdivisions for energy impact projects, virtually all of which are located off the reservations.[12] Companies such as amici curiae are therefore subject to two injustices as a result of the present taxing pattern. First, they are subject to double taxation imposed by two separate, unrelated, and often hostile taxing entities, and second, they rarely, if at all, receive the benefits of the state government programs financed through their tax payments.

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[11]*See* unrebutted Affidavit of Christina Kirschner filed July 9, 1984 in *Cotton Petroleum Corp. et al. v. State of New Mexico,* Consolidated Nos. SF82-2081(C) and 82-2302(C), Santa Fe District Court, New Mexico which confirms that at least in New Mexico state services dealing with mineral development on the Jicarilla Apache Reservation are indeed minimal.

[12]*See, e.g.,* Colo. Rev. Stat. (1973) §§ 32-29-108, 39-29-110; Mont. Code Ann. (1983) § 15-1-501; N.M. Stat. Ann. (1978), § 7-17-5 *et seq.;* Wyo. Stat. (1977), § 9-4-204(n) (for disposition of tax proceeds in the various states); *See also Crow Tribe of Indians v. Montana,* 650 F.2d at 1108.

III.

Existing Principles of Federal Law Protect Amici Curiae From Overlapping State/Tribal Double Taxation.

If this Court follows its decision in *Merrion v. Jicarilla Apache Tribe, supra* note 4, at p.5 (that the Tribes with the approval of the Secretary of the Interior have the power to impose mineral development taxes on reservation mineral development) with a decision in this case that Congress has indeed given the states a blank check to impose their full array of state mineral taxes on the reservations (regardless of whether the states have any responsibility for mineral development on the reservations justifying substantial taxes), amici and reservation mineral developers generally will be subject to overlapping/double tribal and state mineral taxes causing reservation mineral development to become increasingly uncompetitive. We believe that there exists ample authority to reconcile the competing tribal/state interests and to prevent unjustified and injurious overlapping/double taxation. This Court has already acknowledged that under contemporary federal supremacy law, states may tax or regulate Indian related activities where non-Indians are involved when there is a showing of a sufficient state interest. *See generally White Mountain Apache Tribe v. Bracker,* 448 U.S. at 144-45. Determination of whether a sufficient state interest exists calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker, Id.* at 145 (citations omitted). As this Court implied in *White*

Mountain, state taxes may be assessed in those situations where they are imposed "in return for governmental functions it performs for those on whom the taxes fall." *Id.* at 150. *See also Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. at 843 n.7 (1982) ("This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children").

Furthermore, establishing a limited right of state taxation dependent upon a particularized inquiry into the level of state services is also wholly consistent with decisions of this Court prohibiting the imposition of overlapping taxes under the Commerce Clause. *See, e.g., Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 158 n.26 (1982); *Evco v. Jones,* 409 U.S. 91 (1972).

Amici believe that if the Court were to apply these principles of federal preemption and Commerce Clause multiple burden to the problem of tribal and state overlapping/double taxation of reservation mineral development, the states would be able to impose their taxes only when necessary to support specific state services on the reservations, and only in an amount such that the state taxes when considered side by side with appropriate and lawful tribal taxes would not create a tax burden on the reservations which is in excess of the tax burden found off the reservations.[13]

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[13]An additional fact exists to confirm that Congress did not intend that the states' open ended taxing authority contained in the Act of May 29, 1924 (codified at 25 U.S.C. § 398) and in

(Continued on next page)

CONCLUSION

Reservation mineral development for many tribes remains today the most important reservation revenue source. In the name of protecting what are after all frail reservation economics and in the interest of fairness to companies such as amici curiae who are rapidly seeing the overlapping/double reservation tax burden become intolerable, this Court should review side by side the power of the tribes to tax, considered in *Kerr-McGee v. Navajo Indian Nation, supra* p.7, and the power of the states to impose their full array of state mineral taxes on the reservations in this case. In this review the Court should uphold the decision of the Ninth Circuit, limit state taxes to those statistically rare situations where the states require reservation tax revenues to finance state services actually provided reservation mineral development, and

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the Act of March 3, 1927 (codified at 25 U.S.C. § 398c) was to carry over to leases issued under the Act of May 11, 1938 (codified at 25 U.S.C. § 396a-f.) In 25 U.S.C. § 396d Congress instructed the Secretary of the Interior to issue rules and regulations controlling operations under oil and gas leases issued pursuant to the terms of "sections 396a to 396g of this title or any other Act affecting restricted Indian lands". In 1938 the Secretary issued rules and regulations under 25 U.S.C. § 396d which incorporated a provision of the Act of May 29, 1924 authorizing the Secretary to amend leases with the approval of the operator and the tribal lessor, but the Secretary in his regulations did not incorporate those provisions of the very same 1924 Act which authorized state taxation. 25 C.F.R. §§ 186.26, 186.30 (Form 5-157g—Stipulation) (1938). In our view the contents of the contemporaneous regulations confirm that by 1938, Congress and the Secretary understood that reservation economic development could not be pursued if the states were permitted to impose the full array of state taxes on the reservations without regard to the presence or absence of state services or the presence of tribal taxes and fees.

assure that the aggregate tax burden on the reservations, created by two independent and often hostile taxing entities, does not create an overall tax burden which is in excess of that found off the reservations.

Date: December 19, 1984

Respectfully submitted,

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No. 83-2161

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et. al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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STATE OF MONTANA, et. al.,

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BLACKFEET TRIBE OF INDIANS,

Respondent.

PETITIONERS' REPLY BRIEF

The Blackfeet Tribe and the various amici supporting the Tribe all urge this Court to do what Congress did not do--eliminate the tax authorization in the 1924 Act.

Most of the arguments of amici present policy reasons which purportedly support the Tribe's position that there should be no state taxes paid on the Tribe's royalties.

An argument made by the Tribe and by amici Cotton Petroleum, et. al. is that none of the applicable regulations adopted pursuant to the 1938 Act authorized state taxation, and that this lack of tax regulation is evidence that the 1938 Act did not include the tax consent. The Blackfeet Tribe's most vigorous argument is that the State's description of pre-1977 administrative history in relation to state taxes on tribal royalties is factually wrong, and that there is no evidence in the record that the Tribe's royalties were taxed with any consistency in the past. Tribe's Br. 1-3, 7, 22-26.

None of the arguments of the Tribe or the supporting amici undermines the State's arguments expressed in its petition for a writ of certiorari and

in its brief on the merits of this case. This reply brief addresses those arguments which may not have been sufficiently anticipated or explored in the State's petition or opening brief.

I. ADMINISTRATIVE PRACTICE AND POLICY HAVE BEEN TO ALLOW STATE TAXATION OF THE BLACKFEET ROYALTIES.

The Tribe alleges that there is nothing in the record showing that taxes on tribal royalties have been paid consistently or that the United States knew of or condoned the taxation. The Tribe argues that therefore the fact of payment of taxes cannot be used by the Court as evidence of any administrative practice or policy. This argument is astonishing, given the complaint of the Tribe seeking an accounting from the State and a refund for whatever taxes had been paid since 1972 attributable to

the tribal royalty. First Amended Complaint of the Blackfeet Tribe of Indians, No. CV-78-61-GF, Pet. App. 131. Now, more than six years into this litigation, and only after this case reaches this Court, the Tribe has the audacity to say that the taxes have never been paid to any significant extent or with any consistency.

The State has never conceded that, in fact, the tribal royalties have been taxed. See State's Br. 15 n.5; State's Brief in Support of Motion for Summary Judgment (CR 65). In the district court, the Tribe admitted that it had not itself paid taxes to the State (Tribe's Answers to the State's Requests for Admission and Interrogatories, CR 56), but alleged that its royalties had been diminished by taxes paid by producers which the

producers attributed to the tribal royalties. Without naming the producers as defendants, the Tribe sought a refund for its portion of the taxes paid to the State by the producers.

The State argued that the producers (not the Tribe) reported all production and paid all taxes, as required by the Montana statutes. Montana Code Annotated §§15-23-601, -603, -605, -607, -608; 15-36-101, -103, -105; 15-38-103, -106, -108; §82-11-101, -131, -132 and Revised Codes of Montana, 1947, §§84-2202, -2204, -2205, -2209.1, Pet. App. 181-222. The statutes allowed, but did not require, the producers to make pro rata deductions from the royalty payments for the taxes paid by the producers on the tribal royalties.

Ibid. With the exception of the net proceeds of royalty tax which segregated the Tribe's royalty interest, none of the production reports filed by the producers reflected the extent of the Tribe's interests. None claimed exemption from taxation. _See_ CR 65, Ex. 2-6. The State's evidence showed that therefore it was impossible to know from the State's records that tribal royalties had been taxed. CR 65.

In the district court, the Tribe argued that there was extensive evidence that its royalties had been taxed for years. The Tribe submitted evidence showing that its royalties had been diminished by the producers in the amount equivalent to the taxes attributable to the Tribe's royalties. The Tribe relied heavily upon the

Special Report to the Bureau of Indian Affairs attached as Exhibit C to the Tribe's Brief in Support of Motion for Partial Summary Judgment. CR 52. The Tribe now characterizes the same report as showing that some taxation occurred between 1955 and 1977, but argues that the taxation was so sporadic as to be meaningless in the context of administrative practice.

The taxation which the Tribe begrudgingly concedes occurred between 1955 and 1977 does constitute evidence of administrative practices for that period, at least. In addition, it is unlikely that such taxation inexplicably began in 1955, years after the passage of the 1938 Act which the Tribe contends eliminated all authority for the collection of such taxes.

The Tribe also argues that there

is nothing in the record to show that the United States condoned, facilitated, or enforced, the tax collection. Admittedly, the extent of involvement of the United States in the collection of taxes attributable to royalty is not precisely delineated in the record. The State has never argued that the United States has enforced collection of the State's taxes. However, there is evidence in the record showing the involvement of the United States Geological Survey in the crediting of taxes paid by producers against payments owed on tribal royalty. The State's Reply Brief in Support of Motion for Summary Judgment (CR 62) had attached to it a 1978 letter from the United States Geological Survey's acting area oil and gas supervisor to lessees and operators

of Indian tribal land leases located in Montana, including on the Blackfeet Reservation. That letter indicated that while it had been the past practice of the Geological Survey to credit producers' tax payments to their royalty payments, that practice would cease as a result of the 1977 Solicitor's opinion.

The involvement of the U.S.G.S. in diminishing the Tribe's royalties by the amounts of taxes which the producers claimed to have paid is evidence of the United States' facilitation of the collection of the taxes. In addition, the record is clear that the United States has never challenged the collection of taxes attributable to the royalties. After years of litigation in this case, the United States has suddenly appeared as

amicus, but has not suggested that it has ever questioned the State's taxes prior to the 1977 Solicitor's opinion.

The Tribe challenges the State's argument that the various opinions from the Department of Interior also evidence an administrative policy and procedure acknowledging the authority of the states to impose taxes on the tribal royalties. The Tribe argues that the opinions prior to 1977 should be ignored because they do not discuss the 1924 tax authorization in relation to post-1938 leases. It is true that none of the opinions from the Department of Interior, prior to 1977, suggested that the 1938 Act needed to incorporate specifically the already existing tax authorization, or the authorization would disappear, despite the provision in the later statute that

only parts of acts "inconsistent with" the 1938 Act were repealed. The law at that time (and now) was that a repeal of acts inconsistent with a given act shows the intent of Congress "to leave in force some portions of former acts relative to the same subject matter." E.g., United States v. Henderson, 78 U.S. (11 Wall.) 652, 656 (1870). See Petition 35-36; State's Br. 34-36. The fact that the 1977 Solicitor's opinion employed an analysis and made distinctions which had apparently never occurred to anyone before does not elevate that opinion to the position of the first careful and correct review of the question. (Tribe's Br. 3). A reading of the pre-1977 opinions from the Department of Interior on the applicability of Montana's taxes to royalties shows that it had never

occurred to anyone in the Department to opine that the tax consent provision in the 1924 Act had somehow disappeared upon passage of the 1938 Act, or that post-1938 leases were to be viewed differently from pre-1938 leases with respect to taxation. The various opinions from the Department of Interior prior to 1977 show that the Department was aware of the taxation and did not view it as wrong. Pet. App. 232-266.

II. THE ABSENCE OF TAXATION REGULATIONS PURSUANT TO THE 1938 ACT DOES NOT SUPPORT THE TRIBE'S POSITION.

The Tribe supplied the district court with copies of the relevant regulations on Indian oil and gas leasing since 1938. (CR 52). The regulations say nothing at all about state taxation. The Tribe submitted the regulations to support its argument

that the 1924 tax consent was repealed in 1938, arguing that the regulations' silence on authority to tax "obviate[s] any suggestion that the Secretary of the Interior, by regulation, approved taxation of tribal royalties pursuant to the repealed 1924 Act or any other statute." (CR 52, p. 9). In its brief to this Court, the Tribe now points out that new regulations were enacted in 1938 to implement the 1938 Act, and that prior regulations were expressly superseded. Tribe's Br. 21. The regulations referenced by the Tribe, 25 C.F.R. part 186, were the regulations adopted to carry the 1938 Act into effect, and they say nothing at all about consent to tax. Amici Cotton Petroleum, et. al. argue that the failure of 1938 Act regulations to incorporate the tax consent provision

shows that the Secretary of the Interior believed that the tax provision was not authorized, particularly since the 1938 Act regulations did incorporate at least one other provision from the 1924 Act. Cotton Petroleum Br. 15-16 n. 13.

What is not mentioned in these arguments about the effect of the silence on taxation in the 1938 Act regulations is that regulations which implemented the 1924 Act were likewise silent on taxation, despite the express tax consent provision in the 1924 Act. See Regulations Governing The Leasing Of Tribal Lands For Mining Purposes, approved July 23, 1924, by Hubert Work, Secretary of the Interior, Office of Indian Affairs, .12/T73(4)/726, Printed Archives Branch, National Archives, Washington, D.C. The regulations

enacted to implement the 1938 Act did expressly supersede all prior regulations. 25 C.F.R. 186.28 (1938). See also 25 C.F.R. 186.29 (1939), and 211.29 (1984). Unlike provisions that have been implemented by regulation, the tax authorization is not subject to being superseded by subsequent regulations. Contrary to the suggestions and arguments by the Tribe and amici, there is no significance at all to the lack of regulations on taxation of tribal royalties in the regulations implementing the 1938 Act.

III. NO POLICY ARGUMENTS COMPEL THIS COURT TO HOLD THAT THE 1924 ACT'S TAX CONSENT SHOULD NOT EXIST.

The Tribe and some amici consider in detail possible policy concerns which Congress could or should have had in mind when it passed the 1938 Act. E.g., Cotton Petroleum, et. al. Br. 3;

Tribe's Br. 3-4; United States' Br. 7, 20. These policy concerns require an examination of statutes other than the act in question; require conjecture about what Congress might do were it to have certain types of information before it; and demand that this Court ignore both the language of the 1938 Act and those things that the accompanying reports state the Act was to accomplish. Neither policy arguments nor convoluted inferences of what Congress might have meant or should have meant should control the interpretation of the tax consent provision in question. Congress authorized the state taxes in question here, and has done and said nothing to eliminate this authorization. The repealer in section 7 of the 1938 Act left the tax authorization intact.

Arguments about perceived problems stemming from that tax consent should not be used to propose a judicial excise of the provision. Instead, an examination of the language of the controlling statute and its accompanying congressional reports must be made.

This Court has been emphatic and consistent in saying that the relevant language of a statute, not a perceived overall purpose of Congress, must control a judicial construction of a statute. E.g., Ernst and Ernst v. Hochfelder, 425 U.S. 185, 198 (1976). Political branches, not the judiciary, determine what accords with "some modicum of common sense and the public weal," and the judiciary looks skeptically at policy arguments that are not firmly expressed in the

controlling statutory language. T.V.A. v. Hill, 437 U.S. 153, 194-195 (1978). "[This Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." Ibid.

Last month this Court reminded us again that the role of the judiciary is to read the plain language of a statute, and to use as an aid, if necessary, the legislative history of the statute involved. "The authoritative source for finding the Legislature's intent lies in the committee reports on the bill [being examined]." Garcia and Garcia v. United States, ___U.S.___, 53 U.S.L.W. 4016 (December 11, 1984). In Garcia, this Court used standard canons of

construction to interpret the language of the statute in question, and refused to look beyond the committee reports for the statute in order to divine Congress' intent.

In the instant case, the congressional reports accompanying the 1938 Act do not state that previous tax authorizations are inconsistent with the purpose of the 1938 Act. Those reports do discuss the specific practices and situations involving Indian mineral leasing that were considered inimical to the interests of the Indians and thus required congressional action. Pet. App. 343, 355; State's Br. 76-84. The Ninth Circuit and the Tribe would have a judicial examination of the 1938 Act that goes far beyond the language of the Act and its reports. The excuse

for doing this seems to be a perception that authorizations to tax Indian property were a rarity in 1934 and 1938, and that because they were not the "norm," they are suspect. E.g., Tribe's Br. 27; United States' Br. 7, 14. Yet, a brief was submitted to the Committee on Indian Affairs by the Commissioner of Indian Affairs during the I.R.A. Hearings showing that Congress' power to authorize taxation of tribal property was not weakened in 1934. Brief Submitted by Commissioner of Indian Affairs Relating to Power of Congress Over Indians, I.R.A. Hearings at 270. More often than not, when Congress authorized tribes to lease their minerals, it seemed to authorize taxation of those minerals. See, e.g., the statutes listed in State's Br. 35 n. 8.

Even if the conjectures and fears expressed by Cotton Petroleum, et. al., and conjectures made by the United States about differences between the 1924 Act's tax authorization and authorizations in other leasing statutes were true, or if they were somehow relevant to this case, it is significant that these sorts of concerns were not expressed in the 1938 Act itself or in the reports accompanying the 1938 Act or its predecessor bill. Despite the possible problems and burdens described by Cotton Petroleum, Congress did authorize taxation in 1924 and has not done anything to eliminate that authorization. Despite possible differences between the economies of the Oklahoma Tribes and tribes on treaty reservations referred to by the United States

in its brief, Congress did authorize taxation of mineral production included in the 1924 Act, just as it authorized taxation of the property of the various Oklahoma Tribes. The types of problems and concerns described by amici as reasons for not upholding the taxes are not for the judiciary "to speculate, much less act on." "[W]hether Congress would have altered its stance had the specific events of this case been anticipated" is simply not a matter for the courts to decide. T.V.A. v. Hill, supra, 437 U.S. at 185.

In support of a policy argument, amici Cotton Petroleum, et. al., and the Assinibine and Sioux Tribes of the Fort Peck Reservation, et. al. bring to this Court's attention language in 25 U.S.C. §2105 saying that Secretarially-approved joint ventures with Indian

Tribes pursuant to 25 U.S.C. §2101, et. seq., are not subject to or limited by the 1938 Act or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian Tribe. Cotton Petroleum Br. 7 n. 8; Assiniboine and Sioux Br. 7. This language is worth noting only because it shows that Congress uses express language to remove legislative provisions from the operation of existing federal statutes. Congress did not write the 1938 Act to say that leases under that act would not be subject to any other law on the subject. Instead, Congress provided only that parts of acts inconsistent with the 1938 Act were repealed.

IV. SECTION 7 OF THE 1938 ACT LEAVES THE 1924 TAX CONSENT PROVISION INTACT.

The Tribe and various _amici_ make labyrinthine arguments and suggestions purporting to show that the tax consent in the 1924 Act is, in fact, inconsistent with the purposes of the 1938 Act, or at least inconsistent with the purposes of the Indian Reorganization Act. _E.g._, Tribe's Br. 10-18; Crow Br. 4; United States' Br. 24-26. The Crow Tribe even argues that a tribe should be able to try to prove that a particular tax is inconsistent with the purposes of the 1938 Act. Crow Br. 5. As previously discussed, the taxation authority is not inconsistent with the 1938 Act (State's Br. 70-84) or with the I.R.A. (State's Br. 49-66). Also, as noted in part III, _infra_, Congress' practice and power to authorize local

and state taxation of tribal property was not attacked or undermined in 1934. I.R.A. Hearings at 270.

The responses to the State's brief do not come to grips with the meaning of section 7 of the 1938 Act. None of the Tribe's _amici_ appear to challenge directly the construction put on repeals of inconsistent acts as set forth in _Hess v. Reynolds_, 113 U.S. 73, 79 (1885); _United States v. Henderson_, 78 U.S. at 656, _supra_, and IA C. Sands, _Sutherland Statutory Construction_ §23.08 at 221 (4th ed. 1972). _See_, State's Br. 34-35. The Tribe, however, argues that this Court's decision in _Andrus v. Glover_, 446 U.S. 608, 616-18 (1980), compels the interpretation that such a repealer completely repeals or otherwise eliminates an earlier statute on the same subject. Tribe's Br. 21.

Andrus v. Glover does not dispell the long-standing construction of the type of repealer in Section 7 of the 1938 Act. Since Glover is the only authority cited for the proposition that Section 7 of the 1938 Act should be construed contrary to the State's position and supporting authorities, analysis of that case is warranted.

Glover dealt with the question of whether "The Buy Indian Act" authorized the Bureau of Indian Affairs to enter into road construction contracts with Indian-owned companies without following the advertising and bidding provisions of Title III of the Federal Property and Services Act. "The Buy Indian Act" specifically permitted the Secretary to purchase the "products of Indian industry" "in open market," thereby avoiding the advertising and

bidding requirements otherwise imposed on government purchases. 446 U.S. at 613. This Court held that "products of Indian industry" did not include road construction projects. 446 U.S. at 116. Even if that interpretation could apply to "products of Indian industry," this Court noted that there were enumerated exceptions to Title III's advertising and bid requirements. There were no exceptions listed for Bureau of Indian Affairs road construction contracts, so this Court held that such projects did not lie outside the advertising and bid requirements. 446 U.S. at 616-617.

The Tribe apparently relies on Glover because "The Buy Indian Act," Act of June 25, 1910, 36 Stat. 861 provided:

> [t]hat hereafter the purchase of Indian supplies shall be

> made in conformity with the requirements of §3709 of the Revised Codes of the United States [a statute requiring advertising for bids for government procurements]: Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed. [emphasis added].

This Court did not deal directly with the meaning of the repealer of "all Acts and parts of Acts in conflict," in holding that only the purchases of products of Indian industry (and not road construction projects) could be negotiated for, rather than advertised and bid. That was because only the purchases of products of Indian industry were excepted from the advertising provision

of §3709 of the Revised Codes of the Unitex States to which "The Buy Indian Act" was otherwise subjected. Act of June 25, 1910, supra. Subjecting service contracts to the advertising provisions was not in conflict with "The Buy Indian Act," because "The Buy Indian Act" always included service contracts in the advertising requirements of §3709. Glover cannot be analogized to the statutes at issue here, and could not stand for the proposition stated by the Tribe.

Glover could be cited as authority for the Tribe's interpretation of the repealer in Section 7 of the 1938 Act only if the 1938 Act had been drafted differently. In order make the 1938 Act analogous to the statutory language considered in Glover, Congress must have said that the 1938 Act was subject

to the 1924 Act (as "The Buy Indian Act" was subject to §3709), except that there shall be no State taxation of tribal royalties, provided that all acts and parts of acts inconsistent (or in conflict) with the provisions of the Act are hereby repealed. Of course, Congress did not write the 1938 Act that way, and the statutes and this Court's statutory interpretation in Glover cannot be compared to the statutes and their interpretation here.

Glover is the only case authority cited for the proposition that a repealer which repeals inconsistent acts shows a Congressional intent to make a "comprehensive law" replacing prior laws. Tribe's Br. 21. Glover does not support that proposition. Nothing in Glover detracts from the State's argument that a repealer such

as the one in Section 7 of the 1938 Act expressly limits repeals to acts that are inconsistent.

CONCLUSION

Nothing in all of the briefs of the Tribe or *amici* undermines the validity of the State's arguments. The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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